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THE

LAW REPORTS.

Exchequer Division.

REPORTED BY

JAMES M. MOORSOM AND ALEXANDER MORTIMER,
BARRISTERS-AT-LAW;

AND

IN THE COURT OF APPEAL

BY

HENRY HOLROYD AND JOHN EDWARD HALL,
BARRISTERS-AT-LAW.

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DETERMINED BY THE

EXCHEQUER DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THE EXCHEQUER DIVISION

XLIII VICTORIA.

1879
June 18.

IN RE AN APPLICATION OF THE WARWICK AND BIRMINGHAM CANAL NAVIGATION AND ANOTHER *v.* THE BIRMINGHAM CANAL NAVIGATIONS AND OTHERS.

EX PARTE THE LONDON AND NORTH WESTERN RAILWAY COMPANY AND THE BIRMINGHAM CANAL NAVIGATIONS.

Railway and Canal Traffic—Regulation of Railways Act, 1873 (36 & 37 *Vict.* c. 48), s. 11, 12—*Through Rate—Railway Commissioners' Jurisdiction to alter Tolls fixed by Statute—Absence of Party interested.*

Under an Act in 1846 the B. Canal Company were authorized to charge certain tolls, rates, and dues for goods traffic in respect of the canals and other works of the company, and were prohibited from making an order to reduce, advance, or otherwise vary all or any of such tolls, rates, or dues, without the consent of a railway company, who guaranteed that, if the income of the canal company in any year was insufficient to pay a dividend of 4*l.* per cent. on the capital of the canal company, the railway company would make up the deficiency.

The B. Canal Company was one link in a chain of canals owned by various companies and forming a continuous line of navigation between two points. In pursuance of an application made to them by one of those companies the Railway Commissioners, under the Regulation of Railways Act, 1873, s. 11, made an order allowing through rates for goods traffic between those two points, the effect of which would be to reduce the tolls of the B. Canal Company below the maximum allowed by the Act of 1846, and below the amounts theretofore charged by the company. The railway company were not represented before the Commissioners, and did not consent to the order or to any variation of the tolls:—

Held, that the order was made without jurisdiction, and must be restrained by prohibition;

By Kelly, C.B., because the Commissioners could not make an order affecting

1879

WARWICK CANAL COMPANY v. BIRMINGHAM CANAL COMPANY.

the liability of the railway company under their guarantee without at least hearing them;

By Pollock, B., and Hawkins, J., because the consent of the railway company had not been obtained, and the Regulation of Railways Act, 1873, gave the Commissioners no power without such consent to reduce the tolls, rates, or dues as authorized by the Act of 1846.

THE Company of Proprietors of the Warwick and Birmingham Canal Navigation and the Company of Proprietors of the Warwick and Napton Canal Navigation (hereinafter called the Warwick Canal Companies) having canals which form part of a continuous line of inland navigation between South Staffordshire and the river Severn on the one hand, and London and the river Thames on the other, gave notice in 1876 under the Regulation of Railways Act, 1873, s. 11, to the Company of Proprietors of the Birmingham Canal Navigations (hereinafter called the Birmingham Canal Company), and to each of the other canal companies which also formed part of the said line of navigation, of proposed through rates for the traffic of goods over the said line, stating both the amount and their apportionment and the routes by which the traffic was proposed to be forwarded. The Birmingham Canal Company and some of the other canal companies gave written notice of their objections, and appeared before the Railway Commissioners, and were heard by counsel in support of their objections.

The Warwick Canal Companies gave a written notice of their proposals to the London and North Western Railway Company, to which the solicitor for that company replied in writing, stating that the railway company had no control over the Birmingham Canal Company, and requesting the Warwick Canal Companies to withdraw their notice so far as the railway company was concerned. With this exception the railway company sent no answer to the notice, and did not appear before the commissioners by counsel or otherwise.

At the hearing before the commissioners the Birmingham Canal Company made various objections to the proposed rates, apportionments, and routes; inter alia, that the commissioners had no jurisdiction to make the order prayed for, on the ground that if allowed it would have the effect of reducing or varying

the tolls, rates, and dues payable and theretofore paid in respect of their canals and other works, and that the company were forbidden by statute to make any such reduction or variation without the consent of the London and North Western Railway Company, who had not consented. In support of this contention the Birmingham Canal Company relied upon the London and Birmingham Railway and Birmingham Canal Arrangement Act, 1846, 9 & 10 Vict. c. ccxliv.

By s. 5 of that Act it was enacted that without the previous consent of the London and Birmingham Railway Company (which is now merged in the London and North Western Railway Company) the canal company should not "make any order to reduce, advance, or otherwise vary all or any of the tolls, rates, or dues for the time being payable, or to become payable under the recited Acts, any or either of them, or otherwise howsoever upon or in respect of the canals and other works of the same company, or the use or enjoyment thereof respectively within the respective powers for those purposes which are or for the time being shall be subsisting, nor without the like consent enter into any arrangement or agreement with any person in respect of any such tolls, rates, or dues, or rescind or in any manner alter or vary any such arrangement or agreement which now is or for the time being shall be subsisting."

By s. 6 it was enacted that whenever the consent of the railway company was requisite such consent might be given by the directors for the time being of the railway company, and signified in writing either under the common seal of the company or under the hand of the chairman for the time being of the board of directors, or under the hands of any two of such directors.

By s. 15 it was enacted that if and so often as in any year the net amount of the tolls, rates, dues, rents, and other annual profits or income arising from the canals, works, property, and effects of the canal company should be insufficient to produce a dividend of 4*l.* per cent. upon the then capital, the London and Birmingham Railway Company should pay to the canal company such sum as would make up the deficiency.

The maximum tolls, rates, and dues to be taken by the canal company were specified in Schedule C.

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The Railway Commissioners considered that the railway company had by their conduct acquiesced in the application of the Warwick Canal Companies, but that their consent was not required to the order prayed for, and they made an order (20th of June, 1877) allowing the proposed through tolls, rates, and routes as being "a due and reasonable facility in the interest of the public," making, however, some alterations in the apportionments among the various companies.

Proceedings having been taken to get a case stated for the opinion of the Court and having failed, the Birmingham Canal Company, and also the London and North Western Railway Company, in February, 1878, obtained rules calling upon the Warwick Canal Companies to shew cause why a writ of prohibition should not issue, to restrain them and the Railway Commissioners from enforcing, or in any way proceeding to enforce the order of the 20th of June, 1877, or so much thereof as related to the Birmingham Canal Company or their rates, tolls, or dues.

After hearing counsel on the 27th and 28th of June, 1878, and on June 16, 17, and 18, 1879, upon various other points, the Court desired that the argument might be confined to the objection stated above upon the Act of 1846.

Wills, Q.C., *Pember, Q.C.*, and *R. E. Webster, Q.C.*, for the Warwick Canal Companies, shewed cause against the rule, and contended that since before 1873 no such things were known as compulsory through rates or routes, the Act of 1846, s. 5, above set out, could only refer to the local tolls or rates which the Birmingham Canal Company were authorized by that Act to take in respect of their own internal traffic; and that as by the Regulation of Railways Act, 1873, ss. 11 and 12 (1) the commissioners

(1) Sect. 11 of the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), enacts as follows: "Whereas by s. 2 of the Railway and Canal Traffic Act, 1854, it is enacted that every railway company, and canal company, and railway and canal company shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles; and that no such company shall make or give any undue or unreasonable preference or advantage to or in

had power to compel a company to take less than the maximum rate which the company was entitled to charge, it was impossible to suppose that the legislature intended to give such a power where one company was entitled independently to charge tolls and rates, and yet to withhold the power where the consent of another company was required to any alteration in the tolls and rates; the very object of the Act of 1873 being to enable the commissioners to control the tolls and rates charged by companies, and to allow a through rate if they considered it "a due

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favour of any particular person or company or any particular description of traffic in any respect whatsoever, or shall subject any particular person or company or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; and that every railway company, and canal company, and railway and canal company having or working railways or canals which form part of a continuous line of railway, or canal, or railway and canal communication, or which have the terminus station or wharf of the one near the terminus station or wharf of the other shall afford all due and reasonable facilities for receiving and forwarding by one of such railways or canals all the traffic arriving by the other without any unreasonable delay and without any such preference or advantage or prejudice or disadvantage as aforesaid, and so that no obstruction may be offered to the public desirous of using such railways, or canals, or railways and canals as a continuous line of communication, and so that all reasonable accommodation may by means of the railways and canals of the several companies be at all times afforded to the public in that behalf:

"And whereas it is expedient to explain and amend the said enactment: Be it therefore enacted that—

"Subject as hereinafter mentioned, the said facilities to be so afforded are hereby declared to and shall include the due and reasonable receiving, forwarding, and delivering by every railway company, and canal company, and railway and canal company at the request of any other such company, of through traffic to and from the railway or canal of any other such company at through rates, tolls, or fares (in this Act referred to as through rates).

"Provided as follows:

"(1.) The company requiring the traffic to be forwarded shall give written notice of the proposed through rate to each forwarding company stating both its amount and its apportionment, and the route by which the traffic is proposed to be forwarded:

"(2.) Each forwarding company shall within the prescribed period after the receipt of such notice, by written notice, inform the company requiring the traffic to be forwarded whether they agree to the rate and route, and if they object to either the grounds of the objection:

"(3.) If at the expiration of the prescribed period no such objection has been sent by any forwarding company the rate shall come into operation at such expiration:

"(4.) If an objection to the rate or

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and reasonable facility in the interest of the public." They also contended that the London and North Western Railway Company had had an opportunity of objecting, and that they must be taken to have waived their right or acquiesced in the application.

Sir J. Holker, A.G., C. Bowen, and *Potter,* for the commissioners, also shewed cause.

The rules were supported by *Matthews, Q.C., Sir H. James, Q.C.,* and *Jelf,* for the Warwick Canal Companies, and by

Pope, Q.C., W. G. Harrison, Q.C., and *R. S. Wright,* for the London and North Western Railway Company.

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route has been sent within the prescribed period, the matter shall be referred to the commissioners for their decision:

"(5) If an objection be made to the granting of the rate or to the route the commissioners shall consider whether the granting of the rate is a due and reasonable facility in the interest of the public, and whether, having regard to the circumstances, the route proposed is a reasonable route, and shall allow or refuse the rate accordingly:

"(6.) If the objection be only to the apportionment of the rate the rate shall come into operation at the expiration of the prescribed period, but the decision of the commissioners as to its apportionment shall be retrospective; in any other case the operation of the rate shall be suspended until the decision is given:

"(7.) The commissioners in apportioning the through rate shall take into consideration all the circumstances of the case, including any special expense incurred in respect of the construction, maintenance, or working of the route, or any part of the route, as well as any special charges which any company may have been entitled to make in respect thereof:

"(8.) It shall not be lawful for the commissioners in any case to compel any company to accept lower mileage rates than the mileage rates which such company may for the time being legally be charging for like traffic carried by a like mode of transit on any other line of communication between the same points, being the points of departure and arrival of the through route:

"(9.) The prescribed period mentioned in this section shall be ten days or such longer period as the commissioners may from time to time by general order prescribe.

"Where a railway company or canal company use, maintain, or work, or are party to an arrangement for using, maintaining, or working steam vessels for the purpose of carrying on a communication between any towns or ports, the provisions of this section shall extend to such steam vessels and to the traffic carried thereby.

"Sect. 12. Subject to the provisions in the last preceding section contained, the commissioners shall have full power to decide that any proposed through rate is due and reasonable, notwithstanding that a less amount may be allotted to any forwarding company out of such through rate than the maximum rate such company is entitled to charge, and to allow and apportion such through rate accordingly."

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KELLY, C.B. The circumstances of this case are very peculiar and the case is of great importance and considerable difficulty. Here are several canal companies whose canals stretch from the Birmingham district to the Thames in London. The Warwick canal companies, thinking that it will be for their own advantage and also for the benefit of the public if a through route is established along those canals and a through rate for traffic ordered, apply to the Railway Commissioners for an order accordingly. There appear before the commissioners the Birmingham Canal Company and various other canal companies whose canals form part of the proposed route and which have an interest in the traffic, but the North Western Railway Company does not appear before them. In the course of the proceedings the Birmingham Canal Company, which opposed the through rates, made known to the commissioners that under their Act of 1846 the canal company had no power whatever to be parties to any measure which would have the effect of lowering their rates without the consent of the North Western Railway Company, and that the consent of the canal company or the withdrawal of objections by them was of no avail. The commissioners knew that from the arguments and statements made to them by the Birmingham Canal Company, just as well as we know it now, and that quite independently of the fact, to which Mr. Pope has last called our attention, that the Act of 1846 (9 & 10 Vict. c. ccxliv.) is by s. 30 made a public Act. The provisions of that Act were all detailed before the commissioners by those who represented the Birmingham Canal Company, and as soon as the commissioners found a state of things existing which altogether disqualified the canal company from giving any consent or withdrawing any objection to a proposal, which might have the effect of diminishing the canal tolls or rates without the consent of the North Western Railway Company, I think the commissioners were bound as a matter of law, in accordance with the practice of every court, to cause notice to be given to the North Western Company, who were as deeply interested in the question to be determined as any of the parties, to appear before them. Had they done so, the counsel for that company might have urged before the commissioners that which they have now urged before us, and which might have satisfied

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the commissioners that not only would it be unjust to make the order, but that they had no power to make it.

It may be that, so far as affects the public, and also as between the Warwick canal companies and the Birmingham Canal Company and the rest of the canal companies, it would be desirable and equitable to establish the proposed through rate. But to say that this order ought to stand to the prejudice of the North Western Company in the way I shall point out it would, and without hearing that company against the order, seems to me to be opposed to the first principles of the law and to justice.

Now what was the case? For a good consideration an arrangement sanctioned by parliament was made between the Birmingham Canal Company and the railway company, and in order to avoid what would be to the prejudice of the public, namely, constant disputes, litigation and expense between the two companies, the railway company guaranteed (by s. 15 of the Act of 1846) that if in any year the tolls, rates, and other profits of the canal company were insufficient to produce a dividend of 4*l.* per cent. upon the capital of the canal company, the railway company should pay so much as would make up the deficiency.

The canal company were anxious to secure this 4*l.* per cent. on their capital, and therefore agreed that no change should be made which might have the effect of diminishing the rates to be earned and received by them without the consent of the railway company, that consent to be signified in writing in a solemn form under the common seal of the company, or under the hand of the chairman or of any two of the directors. The order of the commissioners sets aside that agreement as completely as if it had never been made, or as if the railway company had in the prescribed form sanctioned the alteration. What power have the commissioners to break or set at naught an agreement for valuable consideration deliberately made between these companies? They have none—at least certainly not without having both companies before them and hearing by counsel or otherwise the railway company. If this order is carried into effect, and it happens to reduce the profits of the canal company so that they cannot pay 4*l.* per cent. on their capital, the railway company must so long as this order is in operation make up the deficiency. I do not say—because we are

not called upon to determine any such question—whether, if the railway company had appeared before them, the commissioners would or would not have have had jurisdiction to make this order on certain conditions. With full knowledge of all the circumstances and of the injurious consequences that may result to the railway company, they have made this order without their consent, without even hearing them.

It is said that something took place between the solicitors, or some officers of the railway company and the Warwick canal companies, as to a notice given by those companies to the railway company which the latter desired them to withdraw. I do not enter into that question at all because it does not arise in this case. It was not a notice emanating from the commissioners calling upon the railway company to appear before them ; it was not anything which would have authorized the railway company to go before the commissioners when the parties were all assembled and say they desired to be heard.

I think, therefore, that the order was against law and justice and made without jurisdiction and must be set aside.

POLLOCK, B. The order of the Railway Commissioners dealt with a continuous line of traffic carried by a series of canals from Birmingham and the surrounding district to the river Thames; and, so far as it was objected to by those who obtained the rules for a prohibition, dealt with one link in that chain of canals, viz., the Birmingham Canal Company. The commissioners find generally that the through rates asked for by the applicant companies, the Warwick and Birmingham Canal Company and the Warwick and Napton Canal Company, are "a due and reasonable facility in the interests of the public," and that the proposed routes are reasonable routes. We may dismiss all questions about reasonable routes, the only question for us being about rates.

Now I assume that the finding of the commissioners, that the through rate is a due and reasonable facility in the interests of the public, is a perfectly correct finding. That is not a matter on which we have to express any opinion. Our office is limited to seeing whether they have any jurisdiction to grant the through rate at all. It is said that they have no jurisdiction, because their

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order is in contravention of the Act of 1846, 9 & 10 Vict. c. ccxliv., which was the joint Act of the London and Birmingham Railway Company and the Birmingham Canal Company, and because the interests created or provided for by that Act were not represented before the commissioners. This is a most important question, and it is desirable to look at the history of the legislation and the mischief sought to be remedied.

Mr. Cardwell's Act of 1854, 17 & 18 Vict. c. 31, gave to the Court of Common Pleas for the first time a jurisdiction controlling the right of railway and canal companies as public carriers in many respects. It deals with two branches of carriage by railways and canals, first, with cases where a preference was given to one customer or one class of traffic over another; and, secondly, with a requirement of the public that every company having railways or canals which formed part of a continuous line of communication, or which had the terminus station or wharf of the one near the terminus station or wharf of the other, should afford all due and reasonable facilities for receiving and forwarding all the traffic. Under that Act I think any company, called upon to do something under either branch of those requirements, would have had a perfect answer if they had shewn that what they were called on to do was not "according to their respective powers." Those are the very words used at the beginning of s. 2 of that Act, and the whole of that section is recited in s. 11 of the Act of 1873, 36 & 37 Vict. c. 48. The Act of 1873 for the first time provides for through rates, but there is no power given to one person as a member of the public or as a customer of the company to apply to the commissioners to enforce upon a line of railway or canal through rates. A scheme for the jurisdiction of the commissioners is set out in the sub-sections of s. 11, under which all the power they have is to consider, when a proposal has been made by one company and rejected by another, whether that which is proposed, or (we may assume also) a reasonable modification of it, is a due and reasonable facility in the interests of the public. Sect. 12 gives the commissioners full power to deal with the through rate, in such a way as to require any forwarding company to receive something less than the maximum rate such company is entitled to charge.

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Now, when you have a statute dealing with a particular subject-matter, and limiting the authority of the commissioners, and when that statute does not deal with other rights of third parties or with previous statutes regulating the rights of different railway and canal companies, that is a strong argument to shew that it was not the intention of the legislature to give the power asked for by those who have supported the order of the commissioners. I ground my decision upon the general language of the Act of 1873 throughout, shewing that there was no intention to create a system by which any member of the public might make a complaint and require the commissioners to call all the companies in question before them, and to deal with them generally, so as to do what may be substantial justice. In my opinion the commissioners had no such power, and if they dealt with this matter in that spirit they exceeded their jurisdiction.

The Act of 1846, passed on the joint application of the Birmingham Canal Company and the London and Birmingham Railway Company, regulated the tolls to be received by the canal company, and provided that those tolls should not be lessened, except with the solemn consent given in the mode prescribed by the railway company. The legislature must have had in view two objects. One was to carry out a fit and honest arrangement between those two companies for the sorting of the traffic, and for the guarantee by the railway company of any deficiency that might take take place in the dividend of the canal company by reason of the sorting; that is merely a private financial arrangement sanctioned by parliament. The other object was a public one, to deal with the two means of traffic between Birmingham and its surrounding district and London, railway and water, in the interests of the public; and the legislature provided, by s. 28 of the Act of 1846, that if at any time it should be found that what was beneficial to the two companies would run counter to the general interests of the public, then the Board of Trade might call upon the canal company to apply to parliament for a statute to amend that Act. That is a very strong power to give to a public board, and it shews that the Act of 1846 is not to be regarded merely as a private arrangement between the two companies.

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Now, is there anything in the Act of 1873 shewing an intention to disturb the Act of 1846, or any of the private Acts, of which that Act is a type, and the existence of which must have been thoroughly known to those who drew the Act of 1873? I can find no language shewing an intention to interfere with such an arrangement as was sanctioned by parliament in former years. I can hardly conceive anything more inequitable than that the commissioners should have power to make such an order as that made in the present case, and yet not have power to call before them and deal with the financial interests of that company which is so largely affected by the order. It might be said that the North Western Railway Company are in one sense the mortgagees of the tolls of the Birmingham Canal Company, and that if for the general welfare of those interested in the goods traffic of the country the mortgagor must give way, the mortgagee must give way too. But any tribunal which found it necessary, in the interests of the public at large, to lower the tolls of the canal company, and found also that such lowering was immaterial to that company because the dividend was guaranteed by the railway company, would, in accordance with the first principles of justice, desire to hear what the railway company had to say, and to consider whether it would not be proper also to release wholly or in part the railway company, who gave the guarantee, from the liability to which they were bound by the Act of 1846. There is a total omission of power to do any such thing, and I think that must not be forgotten in reading the Act of 1873.

I am not aware of any decision which throws light upon this question, unless it be the case of *Toomer* v. *London, Chatham, and Dover Ry. Co.* (1), where it was held that the commissioners had exceeded their jurisdiction in ordering a company to do some act which they had no power to do except with the consent of another company. The difficulty in carrying out the order in that case was to a great extent of a physical character, but the objection to the order was in principle much the same as in the present case.

Upon these grounds I think the present order is in excess of the commissioners' jurisdiction, and as the through rate they have

(1) 2 Ex. D. 450.

sanctioned is an entire matter and was so dealt with by them, we cannot strike out so much as relates to the Birmingham Canal Company and leave the rest remaining. The order therefore being bad in part is bad in its entirety, and this rule must be made absolute.

HAWKINS, J. I am of the same opinion. The effect of the commissioners' order is to vary the tolls upon the canals which form part of the system of the Birmingham Canal Company, and the objection to the order is that that company have no power of their own to alter these tolls, and that that can only be done, if at all, by the consent of the North Western Railway Company. The North Western Company were not parties to the proceedings before the commissioners, and it does not appear that they were enjoined to do anything by the order. It is conceded that by the Act of 1846 the canal company were forbidden without the consent of the railway company to reduce, advance, or otherwise vary, all or any of the tolls, rates, or dues payable in respect of the canals or other works of the company, and that that consent has never been obtained.

Now the Act of 1873 supplied a deficiency in the Act of 1854 with respect to granting through rates or tolls, and I think the language of s. 11, sub-ss. 1, 2, and 3 of the Act of 1873 is of vital importance in considering the present question. Sub-s. 1 provides that the company requiring the traffic to be forwarded shall give written notice to the forwarding company of the proposed through rate and the route. Here the Warwick and Birmingham and the Warwick and Napton Canal Companies did give the proper notice to the Birmingham Canal Company, though it does not appear whether they made the North Western Railway Company parties to the requirement or not. Then by sub-s. 2 the forwarding company (in this case the Birmingham Canal Company) is within the prescribed period by written notice to inform the requiring company whether they agree to the rate and route, and if they object to either, the grounds of the objection. It seems to me that this sub-section points expressly to the case in which the party required to do an act has the power to do it. If he objects he is to state the ground of the objection. A

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more solid objection to a requirement that a party shall agree to something could not be made than this—I cannot agree to it because I have not the power. That seems to me a most reasonable and a conclusive objection.

Then by subs. 3: "If at the expiration of the prescribed period no such objection has been sent by any forwarding company, the rate shall come into operation at such expiration." So that if the Birmingham Canal Company, after receiving the statutory notice, instead of sending in their objection had simply remained silent and said nothing, the through rate would have come into operation at the expiration of the prescribed period without any order of the commissioners. So that, although the Birmingham Canal Company had admittedly no power to alter their tolls, they might virtually alter them by remaining silent for the prescribed period after receiving the notice of the Warwick Canal Companies.

Then sub-s. 5 provides that if an objection is made the commissioners shall consider whether the granting of the rate "is a due and reasonable facility." In construing that I think one must refer back to the language of s. 2 of the Act of 1854, which says that the companies shall "according to their respective powers" afford all reasonable facilities.

The short ground therefore of my judgment is that the commissioners have ordered the Birmingham Canal Company to do something which that company had no power to do, and had no power to agree to do without the consent of the North Western Railway Company.

Rule absolute, with costs against the Warwick Canal Companies.

Solicitors for Warwick Canal Companies: *Taylor, Hoare, & Taylor, for R. C. Heath, Birmingham.*

Solicitors for Railway Commissioners: *Hare & Fell, for Solicitor to the Treasury.*

Solicitors for Birmingham Canal Navigations: *Tucker & Lake, for Wragge, Evans, & Co., Birmingham.*

Solicitor for London and North Western Railway Company: *R. F. Roberts.*

MYERS *v.* DEFRIES AND OTHERS. (No. 2.)

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Dec. 15.

Practice—Costs—Event—Several Causes of Action—Rule 62 *of Rules of Hilary Term*, 1853—*Judicature Act*, 1875, *s.* 33—*Order LV., rule* 1.

When in the same action the plaintiff obtains a verdict and judgment as to one cause of action, and the defendant obtains a verdict and judgment as to other and distinct causes of action, the word "event" in Order LV., rule 1, is to be read distributively, and the defendant is entitled to tax his costs of the issues found for him, provided no order otherwise is made by the judge who tried the cause or the Court.

Rule 62 of Rules of Hilary Term, 1853, is repealed by s. 33 of the Judicature Act, 1875.

MOTION by the plaintiff to review the master's taxation referred to the Court by Field, J., at chambers. The facts and arguments are set out in the judgment.

Nov. 20, 1879. *Murphy, Q.C.*, and *Clay*, for the plaintiff.

Gates, Q.C., and *Gore* (*Edward Pollock*, with them), for the defendants.

The following cases were cited: *Harris* v. *Petherick* (1); *Ex parte Mercers' Co.* (2); *Saner* v. *Bilton* (3); *Staples* v. *Young* (4); *Blake* v. *Appleyard.* (5)

Cur. adv. vult.

Dec. 15. The judgment of the Court (Pollock and Huddleston, BB.) was read by

POLLOCK, B. The plaintiff, by his statement of claim, sought to recover from the defendants, Coleman Defries and Moss Defries, damages in respect of three distinct causes of action: 1, for malicious proceedings in bankruptcy; 2, for libel and slander; 3, for trespass and conspiracy. The action was first tried in July, 1877, when a verdict was found on all the issues for the plaintiff against the defendants Moss Defries and Coleman Defries. A new trial having been ordered, the action was again tried in May, 1878.

The jury on the second trial found a verdict for the plaintiff

(1) 4 Q. B. D. 611.
(2) 10 Ch. D. 481.
(3) 11 Ch. D. 416.
(4) 2 Ex. D. 324.
(5) 3 Ex. D. 195.

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upon the claim for damages for libel with one farthing damages, and for the defendants upon the other issues. The learned judge directed the verdict and judgment to be entered for the plaintiff for a farthing damages upon the claim for damages for libel, and verdict and judgment for the defendants upon the other issues without making any order as to costs, and the associate gave his certificate accordingly. The plaintiff on the 8th of June, 1878, signed judgment in accordance with the certificate. In August, 1878, the solicitors for the defendants Coleman Defries and Moss Defries served notice of motion to the Court to deprive the plaintiff of his costs, and to direct the plaintiff to pay the defendants their costs of the action.

On the 17th of March, 1879, this Court made an order as follows: "It is ordered that the plaintiff have no costs of the action herein, and that there be no costs of this motion on either side," and this order was subsequently affirmed by the Court of Appeal.

The master upon the taxation refused to tax the costs of the issue found for the plaintiff, and taxed the costs of the defendants Moss Defries and Coleman Defries of the issues found for them; and upon this the plaintiff moved to review the taxation upon the ground that, there having been no order by the judge who tried the cause, or by the Court, giving to the defendants any costs they were not entitled to them.

Before the Judicature Act, 1873, this matter would have been governed by rule 62 of the Rules of Hilary Term, 1853, made under the Common Law Procedure Act, 1852, which provided that "when issues in law and fact are raised, the costs of the several issues, both in law and fact, will follow the finding or judgment."

It was argued, however, for the plaintiff, that this rule was repealed either expressly or by implication by the Judicature Acts, 1873 and 1875, and the rules made under the latter, and we think this is so. In the first place, by Order XIX., rules 1 and 2, a new method of pleading by statement of claim and statement of defence is substituted for the old pleadings by declaration and plea, and therefore the issues dealt with by the rule of 1853 cannot now be properly said to exist; and, secondly, by

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Order LV., rule 1, a new rule is laid down as to costs, which is applicable to all proceedings in the High Court, and governs therefore costs in both the Chancery and Common Law Divisions, and this provides "that where any action or issue is tried by a jury the costs shall follow the event, unless upon application made at the trial for good cause shewn the judge before whom such action or issue is tried, or the Court shall otherwise order."

The provisions of this rule must be taken in conjunction with s. 33 of the Judicature Act, 1875, which repeals any enactment "inconsistent with this Act or the principal Act;" and although the provisions of the Common Law Procedure Act, and of Order LV., rule 1, are not in all respects inconsistent, they are so if taken in their entirety since one makes costs follow the event, while the other makes them follow the event unless the judge or the Court otherwise orders; and therefore it seems to us that, applying the well known rules as to the repeal of an earlier by a later statute, which were so recently explained and acted upon by the House of Lords in *Garnett* v. *Bradley* (1) when this very rule was under consideration, it must be taken that the rule of 1853 is abrogated, and our judgment must depend upon what is the true construction of Order LV., rule 1.

But although this be conceded, it does not follow that, when we come to consider what is the true meaning and effect of Order LV., rule 1, we ought not to bear in mind what has been the general tendency of legislation and rules affecting the question of costs, where a plaintiff succeeds as to one portion of a claim and the defendant as to another, from the statute of James I. to the Judicature Acts; namely, that the costs followed the event, and that the successful party had them as of right. Remembering then these provisions as laid down and acted upon for a long series of years, what is the intention of this rule to be gathered from its language? We think it is that where by the statement of claim and statement of defence, or any further pleadings, more than one definite issue is raised and determined by the judge and jury by whom the action is tried, and no order otherwise is given by the judge, the word "event" is to be construed distributively, and if in the same action the plaintiff obtains a verdict and judgment as

(1) 3 App. Cas. 944.

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to one distinct cause of action, and the defendant obtains a verdict and judgment as to another cause of action, these are two events, and the master is to tax the costs accordingly.

It may be that in some cases where there are different findings of a jury in the same action there is but one judgment, and so but one event, for—as was pointed out by Bramwell, L.J., when this case was before the Court of Appeal (1)—the word "event" cannot mean the verdict of the jury without judgment; and, again, there may be cases in which there may be a finding of the jury, and even a judgment, upon some subordinate question raised by the pleadings which could not properly be said to amount to an event, and in which a master, in the absence of some direction by the judge who tried the cause, could only tax generally for the plaintiff or for the defendant; but here no such difficulty arises. The plaintiff claims in respect of three distinct causes of action, as to one of which he succeeds, and as to two of which the defendants succeed, and hence there are three findings of the jury and three judgments; and we are unable to see why the defendants, who have expended costs in defeating the two causes of action in respect of which they have succeeded, may not say that the two events were in their favour as correctly as the plaintiff can say that one event was in his favour; and we think we ought not the less to give this construction to the rule because we may foresee cases in which questions raised at a trial may be so subordinate to the real event of the action or so indefinite that a master might properly say, although there have been many issues there has been but one event. The answer to this sort of objection is that in such cases a direction must be obtained at the trial from the judge who tries the same, as is so frequently done in the Chancery Division.

The plaintiff further argued that failing in his first contention, this Court intended the order of the 17th of March, 1879, to be a final order upon the question of costs, and that the defendants, Coleman Defries and Moss Defries, not having obtained an order in the terms of the notice of motion for payment of their costs by the plaintiff, they are precluded from claiming of the plaintiff any costs either of the action or of any of the issues in the action.

(1) 4 Ex. D. 180.

This argument ought not, we think, to prevail. It seems to us clear that the costs which were the subject-matter of the defendants' notice of motion, and which were dealt with by the order of the Court of the 17th of March, were the general costs in the action; and that the Court, when making that order, had not before them the costs of the two issues upon which the defendants succeeded, and therefore had no intention to deprive the defendants of them.

The result is that there will be no order, and that the plaintiff must pay the costs of this motion and the costs at chambers.

Motion refused.

Solicitor for plaintiff: *Brandon.*
Solicitor for defendants: *J. Hands.*

THE OVERSEERS OF THE POOR OF THE PARISH OF SAINT WERBURGH, IN THE BOROUGH OF DERBY, APPELLANTS; HUTCHINSON, RESPONDENT.

Nov. 29.

Poor Rate—Outgoing Occupier—Liability when no Incoming Occupier—Poor Rate Assessment Act, 1869 (32 & 33 *Vict. c.* 41), *s.* 16.

The statute 32 & 33 Vict. c. 41, s. 16, does not relieve an occupier, who is assessed in a poor rate but ceases to occupy before the rate has been wholly discharged, from his liability to pay the whole rate, unless there is some tenant who succeeds to the occupation of the hereditament, so as to become liable to pay a proportionate part of the rate.

1. UPON the hearing of an information preferred by the appellants against the respondent under s. 16 of the Act 32 & 33 Vict. c. 41, for refusing to pay a poor rate, the justices dismissed the information subject to a case.

2. By s. 16 of 32 & 33 Vict. c. 41, it is enacted that, "If the occupier, assessed in the rate when made, shall cease to occupy before the rate shall have been wholly discharged, or if the hereditament, being unoccupied at the time of the making of the rate, become occupied during the period for which the rate is made, the overseers shall enter in the rate book the name of the person who succeeds or comes into the occupation as the case may be, and the date when such occupation commences, so far as

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the same shall be known to them, and such occupier shall thenceforth be deemed to have been actually rated from the date so entered by the overseer, and shall be liable to pay so much of the rate as shall be proportioned to the time between the commencement of his occupation and the expiration of the period for which the rate was made in like manner and with the like remedy of appeal, as if he had been rated when the rate was made, and an outgoing occupier shall remain liable in the like manner for so much and no more of the rate as is proportionate to the time of his occupation within the period for which the rate was made, and the 12th section of the statute 17 Geo. 2, c. 38, shall be repealed."

3. The following facts were either proved or admitted. The respondent was the occupier of certain premises in the parish of Saint Werburgh, and duly assessed in a poor rate made on the 30th of April, 1879, for the half-year ending the 29th of September, 1879. The rate was demanded of him by the overseers of the poor, and it was stated by the respondent, and not denied by the appellants, that he was then about to give up possession of the premises to his landlord, who intended to pull them down, and to rebuild on the site. The respondent remained in possession of the premises until the 7th of August last, when he quitted the same without having paid the amount of rate at which he was assessed, and which had been demanded from him.

No new tenant would succeed or come into occupation of the premises so occupied by the respondent until they should be rebuilt, which would not be until long after the 29th of September, 1879.

4. It was contended on the part of the appellants that as there was no incoming tenant who would pay the balance of the rate, the respondent was liable for the whole amount, particularly as the amount was due from him immediately after seven days from the making of the rate.

5. On the part of the respondent it was contended that as an outgoing occupier he was liable only for so much and no more of the rate as was proportionate to the time of his occupation within the period for which the rate was made, that is, from the 30th of April, 1879, to the 7th of August following.

6. The justices decided in favour of the respondent. The question for the opinion of the Court was, whether the respondent was liable to pay the whole of the rate, or only so much thereof as was proportionate to the time of his occupation.

A. Glen (*E. R. Moon*, with him), for the appellants. Sect. 16 of 32 & 33 Vict. c. 41, was intended to protect the parish, and not to relieve the outgoing occupier. The latter part of it, as to the liability of the outgoing occupier, is to be interpreted by what appears to be the intention of the Act, and is limited to cases where there is a change of tenancy, and an incoming occupier to whom the overseers may look. In repealing the 12th section of 17 Geo. 2, c. 38, it was only intended to remove the double remedy of the overseers, and not to affect the liability of the outgoing occupier when there is no one to whom such liability may be transferred. This rate was due a week after it was made, and if demanded and not paid might have been distrained for. [He referred to *Edwards* v. *Rusholme*. (1)]

Morley, for the respondent. The liability of the outgoing occupier, mentioned in the last part of the section, must apply to the words at the beginning of it, referring to any occupier who ceases to occupy before the rate is wholly discharged. The proper inference from the words of the section is that the new Act was intended to remove the hardship under 17 Geo. 2, c. 38, s. 12 of the outgoing occupier being obliged, if called upon, to pay the whole rate.

A. Glen was not heard in reply.

KELLY, C.B. It is clear this section contemplates that where there is an occupation for one month by the old tenant and two months more by the new tenants, the former should pay only for one month and the latter for two. How this is to be carried into effect if the parish think fit (perhaps not knowing whether there is to be a new tenant, or thinking that if there be one it is not their business to look after him) to call, under the statute of Elizabeth, for the payment of the whole rate from the outgoing tenant just before he goes out and he pays it, seems a difficult

(1) Law Rep. 4 Q. B. 554.

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question to answer. There is no provision for this that I can see, and it seems very unjust that in such case the occupier for two months should not be liable to pay anything. I do not know whether the answer may be that the outgoing occupier may not be entitled to call for contribution on what may be called the equity of the statute, but that is not the case here, and nothing has happened to release the outgoing tenant from his liability to pay the whole rate. I see there is a provision in the Act that a rate may be paid by instalments, so that in some cases the burden of the rate may be more equally distributed between the two occupiers; but when a rate is made, as this seems to have been, not payable by instalments, there is nothing to prevent the parish recovering the whole of it at once whether or not a new tenant comes in afterwards. In this case, à fortiori, there is nothing to prevent their recovering the whole rate, because nothing has occurred to release the tenant from liability to the whole rate. I think, therefore, our judgment must be for the appellants.

STEPHEN, J. I think that the clause of this statute is not very neatly drawn. It looks as if there might have been some amendment made in it when it was being passed which to some extent altered the language. On the whole, the best construction I can put on it is that it means that, if there is a change of tenancy during the currency of the rate, then the two occupiers are to pay rateably. The outgoing occupier for the time which he has occupied, and the incomer for the time during which he has occupied, but if there is no incomer, but a vacancy, the statute left the matter as it was, and the liability of the outgoing tenant is not affected. Upon the whole, therefore, I think the decision of the magistrates must be reversed.

Judgment for the appellants.

Solicitor: *E. Warriner, for W. B. Hextall, Derby.*

WEBB *v.* EAST.

1879
Dec. 12.

Practice—Production and Inspection of Documents—Tendency to Criminate—Objection on Oath.

A party to an action who objects to the production of a document for inspection, on the ground that it may tend to criminate him, must make the objection on oath.

THIS was an action of libel in which the plaintiff, who had been in the service of the defendant as steward of his estates, alleged that the defendant had written letters which were libellous to a person by whom the plaintiff had been engaged, in consequence of which the plaintiff had been dismissed. The statement of defence alleged that the letters were confidential and privileged communications written by the defendant in answer to inquiries as to the character of the plaintiff.

Interrogatories were administered by the plaintiff among which was one asking whether any copies of any such letters were in the custody or possession of the defendant, and in reply thereto the defendant admitted that he had written three letters, and that copies were in his possession of three letters, of which the dates were given. The plaintiff applied at chambers to a master for an order that he should be at liberty to inspect and take copies of such letters which was refused. On appeal to a judge at chambers the matter was referred to the Court.

Bompas, Q.C., and *P. H. Smith*, for the plaintiff. If the defendant objects to produce these documents on the ground that they may tend to criminate him, he must make that objection on oath. The cases of *Hill* v. *Campbell* (1), and *Atherley* v. *Harvey* (2), so far as they are opposed to this view, are overruled by *Fisher* v. *Owen* (3), and *Allhusen* v. *Labouchere*. (4)

R. E. Turner, for the defendant. It appears upon the face of the proceedings that these letters, if produced, would tend to criminate the defendant, and he is not bound to state that upon

(1) Law Rep. 10 C. P. 222.
(2) 2 Q. B. D. 524.
(3) 8 Ch. D. 645.
(4) 3 Q. B. D. 654.

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oath: *Hill* v. *Campbell.* (1) The former practice of Chancery is now applicable.

[STEPHEN, J., referred to *Boyle* v. *Wiseman.* (2)]

Admitting that the defendant might be called as a witness by the plaintiff, and obliged to state on oath his objection to produce these documents, this is an interlocutory proceeding to which no such rule applies.

Bompas, Q.C., in reply.

KELLY, C.B. I am clearly of opinion that there is no distinction between preliminary proceedings and those before a judge and jury, as to the position of a party to an action who objects either to the production of a document or to any other mode of obtaining evidence, directly or indirectly, on the ground that the evidence may tend to criminate him. In every such case the objection must be taken by the party himself, and supported by his oath.

STEPHEN, J., concurred.

Order for inspection.

Solicitors for plaintiff: *Parkers.*

Solicitors for defendant: *Williams, James, & Wason.*

Nov. 13.

[IN THE COURT OF APPEAL.]

WOODGATE *v.* GODFREY.

Bill of Sale—Inventory of Goods with Receipt attached—Receipt of Sheriff's Officer for Purchase-Money of Goods sold under Execution—Bills of Sale Act, 1854 (17 & 18 *Vict. c.* 36), *ss.* 1, 7.

A receipt containing an inventory and given by a sheriff's officer for the price of goods sold under an execution, is not an "assurance" within the Bills of Sale Act, 1854, and does not require registration under that statute, even although the purchaser from the sheriff allows the execution debtor to remain in possession of the goods.

Ex parte Cooper, In re Baum (10 Ch. D. 313) commented on.

RULE nisi for a new trial returnable before the Court of Appeal. The facts of the case are fully set out in the report of the

(1) Law Rep. 10 C. P. 222. (2) 10 Ex. 647.

proceedings before the Exchequer Division (1), but they may be shortly stated as follows: The goods of C. D. Watson had been seized in execution, and the plaintiff had bought them for 589*l.* 17*s.* The sheriff's officer gave a receipt which mentioned the consideration for the payment by the plaintiff, and which also contained an inventory of the goods. This receipt was never registered under the Bills of Sale Act, 1854 (17 & 18 Vict. c. 36), and Watson remained in possession of the goods. The defendant was a subsequent execution-creditor against Watson, and an interpleader issue having been granted, the question between the parties was whether the receipt and inventory required registration under the statute already mentioned. Pollock, B., at the trial directed the jury that the receipt and inventory did not constitute a bill of sale; and the Exchequer Division (Cockburn, C.J., and Pollock, B.) refused to grant a rule for a new trial. (1) The present rule had been obtained by way of appeal from that decision.

Nov. 12, 13. *Macrae,* shewed cause. The receipt and the inventory do not constitute an "assurance" within the Bills of Sale Act, 1854 (17 & 18 Vict. c. 36). The defendant's counsel may rely upon *Ex parte Odell, In re Walden* (2) and *Ex parte Cooper, In re Baum* (3), but the former was a case of mortgage, and in the latter the insolvent himself had signed the receipt.

[BRETT, L.J. When the order nisi in this case was moved, Thesiger, L.J., was present, and he stated that in *Ex parte Cooper* (3) the Court considered that there was but one transaction, and that without the receipt and inventory there would have been no sale.]

In the present case the receipt was merely evidence of the price, and the inventory merely identified the subject-matter of the sale. The transaction would have been valid, if the receipt and inventory had not existed.

Percy Gye, in support of the rule. This case is concluded by *Ex parte Odell* (2) and *Ex parte Cooper.* (3) The Court cannot discharge this rule without overruling those decisions.

(1) 4 Ex. D. 59. (2) 10 Ch. D. 76.
(3) 10 Ch. D. 313.

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JESSEL, M.R. The difficulty in this case is occasioned by the decision in *Ex parte Cooper, In re Baum* (1); it is not easy to discover the principle upon which the judgment proceeded; but we have had the benefit of some remarks made by Thesiger, L.J., as to that case, and those remarks shew that the decision may be explained upon an intelligible principle. That principle is, that independently of the document there was no sale of the goods, that there was one transaction constituted by the inventory and the receipt thereto attached, and that if there had been no document there would have been no transaction. Accordingly, the Lords Justices held that the document was an "assurance" within the Bills of Sale Act, 1854, and required registration. But we have now to deal with a case where the facts are of a different nature. The goods were sold by the sheriff in the performance of his duty; the receipt is merely evidence of payment, and the inventory merely identifies the subject-matter of the sale. Under a writ of fi. fa. a sheriff may sell without any bill of sale, and upon payment of the price the transaction will be complete, and the property in the chattels sold will vest in the buyer without any writing. Suppose that an auctioneer sells a large quantity of goods in lots, and gives a separate receipt for each lot: surely the receipts cannot be "assurances," at least within the meaning of the Bills of Sale Act, 1854. Suppose that upon the 1st of January goods are sold and the price is paid, but that the buyer does not take possession of them, and suppose that upon the 1st of July a bill of sale of the same goods is executed between the same parties: the omission to register the bill of sale will not affect the transaction and annul the sale of the goods, which has taken place six months before. I think that the decision of the Exchequer Division must be affirmed.

BRAMWELL, L.J. I am of the same opinion. The reasoning of the Lords Justices in *Ex parte Cooper, In re Baum* (1) would go to shew that a mere receipt for the price of goods is an "assurance," and therefore a bill of sale within the meaning of the Bills of Sale Act, 1854. The legislature has thought fit to declare what the law shall be in future, and by the Bills of Sale

(1) 10 Ch. D. 313.

Act, 1878 (41 & 42 Vict. c. 31), s. 4, it is enacted that the expression "bills of sale" shall include amongst other documents "inventories of goods with receipt thereto attached, or receipts for purchase-moneys of goods." Under the new statute a question may arise whether its provisions can extend to a mere receipt for a sum of money which does not mention the consideration for the payment, but which is in truth an acknowledgment for the price of goods sold and left in the possession of the vendor. It is unnecessary to express any opinion upon this point now, but I wish to say that this remark has occurred to me as to the case before us: suppose the receipt had no stamp, and so was not admissible in evidence: might not the plaintiff say and prove, "I bought and paid for those goods." Strictly speaking, the receipt is not evidence at all; it is a mere declaration by the vendor that he has been paid, and, like other declarations, not admissible. The fact must be proved. I have only to add that I entirely agree with the judgment of Cockburn, C.J., pronounced in the Exchequer Division when this case was before it.

BRETT, L.J. This case is not concluded by *Ex parte Cooper, In re Baum.* (1) It was merely decided in that case that the receipt and the inventory were under the circumstances a bill of sale. The ground of the decision was that the sale of goods, the drawing up of the inventory, and the signing of the receipt formed but one transaction. That was the view of Thesiger, L.J., when this rule was moved, and it explains the decision. Therefore we are not bound in the present case by *Ex parte Cooper, In re Baum* (1); and it seems to me that, upon the sale by the sheriff and payment of the price, the property in the goods passed and the transfer was complete before the receipt and the inventory were signed. I am of opinion that the receipt and the inventory did not constitute an "assurance" within the meaning of the Bills of Sale Act, 1854.

Rule discharged.

Solicitors for plaintiff: *Walker & Mewburn Walker.*
Solicitor for defendant: *J. W. Heritage.*

(1) 10 Ch. D. 313.

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Dec. 2.

[IN THE COURT OF APPEAL.]

LAX AND BAINBRIDGE *v.* THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF DARLINGTON.

Negligence—Owner of Land receiving Payment for use of Land.

The defendants were the owners of a cattle-market, and in the market-place they had erected a statue, round which they had placed a railing as a fence. The plaintiffs attended the market with their cattle, and occupied a particular site, for which they paid a toll. A cow belonging to them, in attempting to jump the railing, injured herself, and subsequently died from the injuries. The jury found that the railing was dangerous:—

Held, that the defendants having received toll from the plaintiffs, and invited them to come to the market with their cattle, a duty was imposed on them to keep the market in a safe condition, and therefore an action would lie against the defendants for the loss sustained by the plaintiffs.

ACTION to recover damages for injuries to a cow which resulted in her death.

The cause was tried at the summer assizes, 1878, holden at Durham, before Lush, J., when a verdict was found for the plaintiffs for 22*l.* 14*s.* 6*d.*, and the learned judge reserved the case for further consideration.

The facts sufficiently appear in the following judgment:—

Dec. 21, 1878. LUSH, J. This action is brought to recover compensation for the loss of a cow, which came to her death from an attempt to leap over a spiked fence put up by the defendants round a statue, which they had erected in the market-place of Darlington. The defendants are the owners of the market, which is held for the sale of cattle, and the plaintiff Bainbridge had for many years brought his cattle there for sale. The market is held in the public street. The plaintiff Bainbridge had regularly occupied with his cattle a given site, for which he paid toll, and the statue had been erected near to that site between two or three years before the accident happened. The only point contested at the trial was, whether the spiked railing was or was not of sufficient height from the ground. The top of the spike was 2 ft. 6 in. from the stone in which the bars were set, and this the jury found was insufficient, and the railing, being spiked, was

consequently dangerous to cattle having a propensity to leaping. It was not contended that the plaintiff Bainbridge was guilty of any negligence by not properly looking after or managing his herd. The point made at the trial, and which has since been argued, was, that the corporation was under no obligation to have the fence at such a height as that cattle could not or would not be tempted to leap it; that the plaintiff was a licensee who must take the market as he found it; that there was plenty of room for him to stand his cattle elsewhere (which for aught that appeared was a fact), and that, as the danger was not concealed but obvious and apparent, he placed the cattle there at his peril.

I am of opinion that neither of these objections is tenable. The franchise of a market, like that of a port, is granted for the benefit of the public, and every one has as good a right to frequent the market for selling and buying the marketable commodities as he has to traverse a public highway. The grantee of a market, especially when he takes a toll for his own benefit, does, I think, incur an obligation to maintain the market in a state reasonably fit for the purpose for which it was granted. See the observations of Bayley, J., in *Prince* v. *Lewis.* (1) I see no reason why, if he erects in the place which he appropriates to the market any obstruction, which causes danger to the property or the persons of those who frequent the market for a lawful purpose, he should not be liable to an indictment as much as the person who places a dangerous obstruction in a public highway. Of course, when the danger is, as it was in this case, obvious and apparent, a person who heedlessly and without reasonable care to avoid it incurs damage cannot maintain any action, because he is the author of his own wrong; but he is not a contributor to his own wrong by going to the market. The owner, or the person who in legal phraseology is lord of the market, has no right to say to him, "You might have gone to some other market, and as you chose to come here with your cattle you elected to run the risk." Nor can the owner of a port excuse himself for erecting a dangerous obstruction to the navigation by saying to the shipowner, "You might have gone to some other port." The subject using a port or a market is not a mere licensee; he is

(1) 5 B. & C. at 371.

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exercising a right as one of the public for whose benefit the port or the market was erected, and is entitled to have a free and safe passage in the one case, and a safe standing-place in the other. I was impressed at the time with an argument urged by Mr. Herschell. Suppose, he said, that the market was situate on the bank of a river or lake, is the owner responsible for cattle brought there if they run into the water and drown themselves? If the specific spot were designated in the charter by which the market was granted, so that the grantee had no option to hold it elsewhere, I am inclined to think he would even in that case be bound to fence for the protection of cattle; but if no place was designated, and he voluntarily selected so dangerous a spot, I should say certainly he would. This case, however, does not require that question to be answered. The charge against the corporation is of misfeasance, not of nonfeasance. The erection which constituted the danger in this case was an artificial erection by them, by which they rendered a safe market an unsafe one; that was a wrongful act. Nor do I think it is competent to the defendants to object that the plaintiff Bainbridge chose to continue standing his cattle in the place which he had been accustomed to use long before the statue was erected. Every part of a market-place is open to buyers and sellers, subject to the reasonable control and regulation of the lord of the market; and the selection of the spot in question is as much the act of the corporation as of the plaintiffs, for they regularly charged and received toll for the use of that specific site. Besides, it is impossible to say that the damage would not have happened, if the herd of which the cow formed part had been stationed at some other part. But whether it would or not, is not in my judgment material. The defendants had done a wrongful act in placing the spiked railings in the cattle-market so low as to be dangerous to the cattle. This was the immediate cause of the injury, and they cannot say that the plaintiffs were guilty of negligence in using that part of the market which the defendants assigned to the plaintiffs, though it was in proximity to the danger, they not being guilty of any negligence which immediately conduced to the accident: see *Clayards* v. *Dethick* (1); *Thompson* v. *North*

(1) 12 Q. B. 439.

Eastern Ry. Co. (1) I therefore give judgment for the plaintiffs for the agreed amount, 22*l.* 14*s.* 6*d.* and costs.

The defendants appealed.

1879. June 24, 25. *Herschell, Q.C.*, and *Sheild*, for the defendants. The jury have found that a danger to cattle existed in the market place, but that danger was at least as obvious to the plaintiffs as to the defendants. The plaintiffs were aware of the risk they ran, and this case is not that of a man who invites another on to his premises on which there is a concealed danger, like that in the case of *Indermaur* v. *Dames.* (2) A warning was not necessary, which might have been required if the danger had not been apparent: *Winch* v. *Conservators of the Thames.* (3) The only duty incumbent on the defendants was not to deceive: *Gautret* v. *Egerton.* (4) They have been guilty of no breach of duty, and in considering whether they are liable, all the circumstances must be looked at. The plaintiff Bainbridge was a regular attendant of the market, and therefore was well able to judge whether it was advantageous to sell his cattle there. If the risk had been considerable, he might have sent them elsewhere.

Cave, Q.C., and *John Edge*, for the plaintiffs. It is important to see what the duty of the defendants towards the plaintiffs really was. The defendants were owners of land, and the obligation of the owner of land towards persons using it may be classed under four heads:—1. The owner may grant a bare licence for the use of his land; but this licence is always revocable. 2. The licensee may come upon the land for the benefit of both, as where the owner of goods goes to a railway station to assist to unload them; in that case the owner of the land is bound to keep it in a reasonably secure condition: *Holmes* v. *North Eastern Ry. Co.* (5) 3. A person may come upon land not as licensee but in exercise of a right which may arise either out of a contract, or independently of a contract, such as a private right of way: here the owner of the land must do nothing to interrupt the enjoyment of the right.

(1) 2 B. & S. 106; 31 L. J. (Q.B.) 194.

(2) Law Rep. 1 C. P. 274; affirmed, Law Rep. 2 C. P. 311.

(3) Law Rep. 7 C. P. 458; affirmed, Law Rep. 9 C. P. 378.

(4) Law Rep. 2 C. P. 371.

(5) Law Rep. 4 Ex. 254.

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4. The duty of the lord of a fair or market towards persons using the market. If any part of the market becomes dangerous, the lord may exclude the public from it, for he may remove it from one part of the limits of his grant to another: *Curwen* v. *Salkeld.* (1) He cannot, however, erect an obstruction in the market dangerous to those using it. He is bound to afford proper accommodation to those who frequent it: *Prince* v. *Lewis* (2); *Mosley* v. *Walker* (3); *Rex* v. *Starkey.* (4) It is not sufficient to exonerate the defendants that the plaintiffs knew of the danger: it was an act of commission, and not of mere omission, which made the particular place dangerous to the plaintiffs' cows.

Herschell, Q.C., in reply.

Cur. adv. vult.

1879. Dec. 2. The following judgments were delivered:—

BRETT, L.J. In this case the plaintiffs brought an action against the defendants, as owners of a market for the purposes of purchase and sale. The cause was tried before Lush, J., and a jury, and the only question left to the jury was whether a certain part of the market was dangerous, and upon that question they found their verdict for the plaintiffs. As I apprehend, the real meaning of such a finding is that that particular part of the market was dangerous for the purposes of the standing of cattle. The case was elaborately argued before Lush, J., and again before us, but in both instances the whole stress of the argument was upon the question, whether the defendants, as the owners of the market, were under any liability to those who brought their cattle there to have the market not in a dangerous state for the reception of cattle.

Upon that question I have no doubt whatever. The defendants are the owners of a market to be used for the reception of cattle. They no doubt have a franchise which gives them a monopoly, but as between them and those who bring cattle to the market, they are in the position of owners of land receiving the cattle of persons who bring cattle there, they taking for the reception of those cattle what is called a market toll.

(1) 3 East, 538.
(2) 5 B. & C. 363.
(3) 7 B. & C. 40.
(4) 7 Ad. & E. 95.

The toll of a cattle market consists of various items, although they are not distinguished; the toll is no doubt paid in one sum, but a part of the toll is a payment for the liberty of standing cattle, either in any part of the market or on a particular spot, and under those circumstances the question is wholly independent of the defendants having the franchise of the market; they are in a position of owners of land receiving cattle on their land for the purpose of affording, amongst other things, standing room for the cattle in consideration of a payment made to them, and I cannot doubt myself upon the most ordinary principles of law, that inasmuch as they receive payment for that standing, they are primâ facie under the liability of affording a place which is not dangerous for the purposes for which the payment is made. Therefore upon the main question—and the question which was really argued before Lush, J., and before this Court—I am of opinion that the defendants were under the liability—primâ facie, at all events—of affording a reasonably safe place for the standing of cattle. The finding of the jury is, that they did not do so; therefore, in my opinion, the defendants were liable, and our judgment upon that ground ought to be against them.

No other question was offered for the consideration of the jury, and it seems to me obvious that it was the purpose of both parties that no other question should be offered to them. If there had been evidence of any other question, and the parties had desired it, the learned judge would have left it to them. I do not doubt that although the defendants are primarily liable as I have stated, yet if the plaintiffs themselves were guilty of an unreasonable want of care in the mode in which they put their cattle into the place destined for them, or if the plaintiffs wilfully and purposely undertook a risk and danger which was fully known to them, under those circumstances, notwithstanding the primary liability of the defendants, it would be right in point of law to say the plaintiffs had contributed to the loss, or that they were the sole cause of the damage to their cow. But it seems to me that no such question could be raised against the plaintiffs, unless there was evidence to support it, and unless the parties desired that such a case should be left to the jury. In the absence of any such question being raised, I am of opinion that the defendants were

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liable, and that the judgment of the learned judge was right, and that judgment ought to be affirmed.

BRAMWELL, L.J. My Brother Brett has come to the conclusion that the plaintiffs are entitled to our judgment, and I agree with him. I should like to say why I agree. I am not influenced by the consideration of this being a market; it might have been a cattle show, or a place opened by the defendants as a speculation of their own. Market or no market, the ground upon which I proceed is that the defendants receive the plaintiffs' money; they take a toll from the plaintiffs and they make a profit, they invite the plaintiffs to come and make use of their market for profit to themselves. The defendants are therefore liable; as my Brother Brett has said, they are bound to have the place in a non-dangerous condition for those who come there for any lawful purpose on certain occasions. My opinion would have been the same, if the defendants had dug a trench in the market to lay down gas pipes, or if a gas company under some power had made a trench; it does not matter, in my judgment, whether the defendants did it or whether somebody else did it. If the place was not safe, if there was a danger that was not obvious to any person coming there, that person ought to have been warned against it, and it should have been said, "If you come, you must come and take the place as you find it, for the situation of things is such that there is danger there." The defendants did not warn the plaintiffs, and the jury have found that the place was dangerous, and therefore there is, in my opinion, a primâ facie case against them, not upon any ground of negligence or misfeasance, but simply upon this ground, that they have not done their duty to their customer in apprising him that there was danger in his accepting their invitation and allowing him to come to their ground for a profit to themselves. That is the ground on which, in my opinion, the plaintiffs are entitled to judgment.

It was argued before us that the plaintiffs incurred the loss through their own fault, and that they came into the market-place notwithstanding the danger was obvious, or that they knew of it. I think we were told that one of their cows had met with a similar accident on a former occasion, and that they chose to go

there with a knowledge of the danger. If that question had been before us, I should have had very great misgivings whether the plaintiffs were entitled to recover, because, if they knew the amount of the danger and chose to risk it, it is their own fault, they are volunteers; and in my opinion the defendants ought not to have been made liable to them in that case. I do not want to go into the matter at any length, but I think there is an important principle involved in it—a principle as to which there are continual mistakes made and great injustice done. We have an exemplification of it in the common case of a passenger by a railway. A person travelling on a railway is taken to some place where he ought not to have been taken—beyond a platform, for instance. He jumps out, risking the danger, and hurts himself. In my opinion, in such a case as that he ought to have no remedy against the company for the hurt; if he chooses to jump out and hurt himself, he must take the hurt. What he must do is to sit in the carriage and be carried on beyond where he wants to go, and then bring his action against the company for not affording him proper accommodation to get out. I have no doubt of the good sense of that; I have not a misgiving of it, and I cannot agree to a great deal of what was said in the case of *Clayards* v. *Dethick*. (1) It was there asked, "Was the cabman bound to stay in all day?" Bound! Bound to whom? A person being bound supposes his being bound to somebody. It is an inaccurate expression. One does not care about words, except when they mislead. The expression "bound" was used there. Why, of course, he was not bound, because there was nobody to say to him "you shall." But if he chooses to go out with an obvious danger before him, he must take the consequences. Suppose a man is shut up in the top room of a house unlawfully, is he bound to stay there? He is not bound to do anything of the kind; he may jump out if he likes to run the risk of breaking his neck or his limbs; he may let himself down by a rope or a ladder, but if he runs the risk of getting out and breaks his neck, the person who shuts him up is not guilty of manslaughter; and if he breaks his leg, he ought not to have any right of action against that person, although he was not bound to stay there. Then there was

(1) 12 Q. B. 439.

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another expression used, which I cannot help thinking was an unfortunate one. It was this: "What would a prudent man do?" Just see the consequence of that sort of reasoning. A prudent cabman with a good horse having a shilling fare offered to him would have stopped at home; a prudent cabman with a bad horse and a pound fare offered to him would have chanced it. The consequences would be that he could recover if he hurt a bad horse, but he could not recover if he hurt a good one. The truth is, to talk of what a prudent man would do is a misleading way of considering the matter. A prudent man would lead a forlorn hope under some circumstances, because the possible gain in his estimation would be equal to the risk. It is not, therefore, a question of prudence. I dare say a prudent man might jump out of a train going very fast, if he saw some imminent danger to his wife, or child, or anybody for whom he had great affection, and he could immediately go and rescue or help them. It is not, therefore, a question of prudence as far as he is concerned. I think that case —I should not have discussed it at the length I have done if an erroneous idea was not conveyed by it—can only be justified on a ground which I think will be found, especially in the judgment of Wightman, J., and upon which I am inclined to think some of the judges really decided it. It is this: that the danger there was not an obvious one; that when the cabman went out he got into trouble from what in truth was a pitfall, the nature of which he was unaware of, but which had been prepared for him by the defendant. Upon that ground, perhaps, the judgment may be supported; but I have a misgiving, even then, whether, when there was a danger of accident, it was not his—I will not say his duty—but whether it was not for him to ascertain the extent of it before he ran the risk of it. However, I think it is upon that ground only that that case can be sustained. It is said that it has been afterwards cited and adopted in *Wyatt* v. *Great Western Ry. Co.* (1) It was no doubt cited and adopted, but I am very much inclined to think it was adopted upon the principle that I have mentioned, and that may be seen especially from the judgment of the majority of the Court. If *Clayards* v. *Dethick* (2) and *Wyatt* v. *Great Western Ry. Co.* (1) are adopted

(1) 6 B. & S. 709; 34 L. J. (Q.B.) 204. (2) 12 Q. B. 439.

to their full extent, I am constrained to express my distrust of those cases. I am glad to think that this last question does not arise here. If the jury had found that the plaintiffs knew of the danger, or that it was obvious to them, I should have had very considerable misgiving as to whether they were entitled to judgment.

COTTON, L.J., concurred in the judgment of Brett, L.J.

Judgment affirmed.

Solicitors for plaintiffs: *Chester & Co., for T. Clayhills, Darlington.*

Solicitor for defendants: *A. Scott Lawson, for Hugh Dunn & Watson, Darlington.*

THE SINGER MANUFACTURING COMPANY *v.* CLARK.

Nov 29.

Pledge of Goods—Pawnbrokers Act, 1872, 35 & 36 *Vict. c.* 93, *s.* 25—*Rights of Owner of Goods pledged against his Will.*

The indemnity given by section 25 of the Pawnbrokers Act, 1872, to a pawnbroker who delivers a pledge to the person producing the pawn-ticket applies only as between the pawnbroker and the pawner or the owner who has authorized the pledge, and the Act does not affect the common law rights of the owner of property which is pledged against his will.

SPECIAL CASE on appeal from the Southwark County Court.

On the 16th of October, 1878, the plaintiffs, who carry on (inter alia) the business of letting out sewing machines on hiring agreements, let a machine No. 2,313,254, the admitted price of which at the time of hiring was 7*l.* 17*s.*, to one Elizabeth Smith, who on the same day signed an agreement in the form hereinafter set out, and took possession of the machine thereunder:—

"Agreement made the 16th day of October, 1878, between the Singer Manufacturing Company, of 39, Foster Lane, Cheapside, London, herein called the 'owners,' of the one part, and Elizabeth Smith, of 225, Mayall Road, Brixton, herein called the 'hirer,' of the other part.

"Whereby the owners agree to let to the hirer the sewing

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machine and accessories described by the indorsement hereon, and the hirer agrees:

"A. To pay the owners, on hiring the machine, the sum of—

"B. To pay the owners, on and after this date, a rent of 2*s.* 6*d.* per week, payable weekly, in advance.

"C. To keep the machine and accessories in good order and undefaced (damage by fire included), fair wear only excepted, and at all times to allow the owners' authorized agents to inspect the same.

"D. To keep the machine and accessories in the hirer's own custody at the above-mentioned address, and not to remove them without the owners' previous consent in writing.

"E. That if the hirer do not duly perform this agreement the owners may (without prejudice to their right to recover arrears of rent and damages for breach of this agreement) terminate the hiring and retake possession of the said machine and accessories, and for that purpose leave and license is hereby given to the owners to enter by force, if necessary, any premises occupied by the hirer or of which the hirer is tenant, to search for and retake possession of the said machine and accessories without being liable to any suit, action, indictment, or other proceeding by the hirer or any one claiming under him or her.

"F. That when the hiring is terminated, $\frac{\text{and}}{\text{or}}$ the machine and accessories are returned to the owners, the hirer shall not, on any ground whatever, be entitled to any allowance, credit, or return for payments previously made, and the sum paid on hiring shall not be set off against rent.

"The owners agree:

"A. That the hirer may terminate the hiring by delivering up to the owners the machine and accessories.

"B. That the hirer may at any time during the hire become the purchaser of the machine and accessories by payment in cash of the hereon indorsed price.

"C. That if such purchase be effected, credit will be given for all payments previously made under this agreement, and if the rent has been regularly paid a further credit of 5 per cent. will be allowed upon the payment on hiring, provided it amounted to 1*l.* or upwards. Unless a purchase be effected the hirer shall remain bailee only of the machine and accessories."

2. No payment was ever made under the hiring agreement by Elizabeth Smith, or by any person on her behalf, to the plaintiffs or to any of their agents, and it was admitted on the part of the defendant that at the time when the machine was pledged, as mentioned in the next paragraph, the bailment had been determined, and the plaintiffs were entitled to the possession of the machine.

3. On or about the 30th of November, 1878, the machine was pledged with the defendant in the name of Brown, for a loan under 40*s.*, but whether by Elizabeth Smith, or by some other person with or without her consent, did not appear.

4. On the 9th of December, 1878, a clerk in the service of the plaintiffs saw the machine on the premises of the defendant, such premises being licensed premises wherein the defendant carries on the business of a pawnbroker under the provisions of the Pawnbrokers Act, 1872, and thereupon served him with a demand of possession on the part of the plaintiffs in the words following:—

"As agent for and on behalf of the Singer Manufacturing Company of 39, Foster Lane, Cheapside, in the city of London, sewing machine manufacturers, I hereby give you notice that the sewing machine numbered 2,313,254 in your possession is the property of the Singer Manufacturing Company, having been hired by Elizabeth Smith, of 225, Mayall Road, Brixton, under an agreement bearing date the 16th day of October, 1878. And I hereby demand that you forthwith deliver to bearer hereof, who is fully authorized to receive the same, the said sewing machine."

5. The defendant refused to deliver up the machine to the plaintiffs or their agent under the notice of demand on the ground that it was informal and invalid, as not being in compliance with the provisions of the Pawnbrokers Act, 1872.

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6. The plaintiffs took no further steps until they commenced the present action.

7. It was admitted that plaintiffs were not the holders of the pawn ticket relating to the pledge, and that when the notice of demand was served on the defendant the plaintiffs did not tender to him the amount of the loan, and the profit due upon the pledge.

8. On or about the 13th of January, 1879, the defendant delivered the pledge to a person producing the pawn ticket relating thereto on the payment of the loan and profit, but gave no notice to the plaintiffs or their agent of his having done so.

9. On the 17th of February, 1879, the plaintiffs became aware of the defendant having delivered the machine, as in the last paragraph mentioned, and on the 22nd of the same month they commenced this action against the defendant in trover, and for wrongful conversion of the sewing machine, and claimed 7*l.* 17*s.* as damages.

10. On the hearing the above stated facts were admitted.

11. It was contended on the part of the plaintiffs that their common law right, as owners, to demand possession of their own property, and to sue for damages for the wrongful conversion thereof by the defendant, was not affected by their not having availed themselves of the provisions of the Pawnbrokers Act, 1872, their title as true owners being paramount to that of the owner.

12. On the part of the defendant it was contended that a pawnbroker was not liable in trover at common law when the alleged act of conversion was, as in this case, an act done in conformity with the provisions of the Pawnbrokers Act, 1872, and when the plaintiffs, as owners, had not availed themselves of the provisions contained in s. 29 of the Act; that the machine having been pledged for a loan under 40*s.* the case was within the provisions of the Act, which by s. 10 are applied to every loan by a pawnbroker of 40*s.*, or under: that s. 29 provided a remedy for the true owner by a declaration in the form contained in the 4th schedule to the Act: that further in default of such prescribed form of declaration being delivered by the plaintiffs to the defendant, the defendant was bound to deliver back the machine, on

payment of the loan and profit, to any person producing the pawn-ticket relating thereto, and would by neglecting or refusing so to do have rendered himself liable to a penalty not exceeding 10*l.*, as having been guilty of an offence against the Act (s. 45).

13. It was further contended on the part of the defendant that having regard to the period limited to three days, within which a declaration shall be made as provided by s. 29 of the Act, the plaintiffs in standing by from the 9th of December, 1878, to the 17th of February, 1879, might be deemed to have foregone their right (if any) of priority over the holder of the ticket to require delivery of the machine with or without a tender of the loan and profit to the defendant.

The judge of the county court gave judgment for the defendant.

The questions for the opinion of the Court were:

First. Whether this action was maintainable by the plaintiffs, notwithstanding the provisions of the Pawnbrokers Act, 1872?

Second. Whether in the circumstances of this case, assuming the action to be maintainable, the plaintiffs were entitled to succeed?

Benjamin, Q.C. (*Lumley Smith,* and *Candy,* with him), was heard for the plaintiffs, and

J. Brown, Q.C. for the defendant.

Cur. adv. vult.

July 29, 1879. HAWKINS, J., delivered the judgment of the Court (Huddleston, B., and Hawkins, J.)

The question in this case is, whether the true owner of an article which has, without his knowledge or consent, been pledged with a pawnbroker for such a sum as will bring the contract of pledge within the operation of the Pawnbrokers Act, 1872, is entitled, in exercise of his common law right, to recover it or its value from the pawnbroker by action—notwithstanding the pawnbroker has returned it to the pawner who has redeemed it, or whether his common law right so to do has been taken away by the provisions of the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93.)

The facts being all fully stated in the special case, it is unnecessary to repeat them.

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On the part of the defendant, the pawnbroker, it was contended that he having delivered up the pledge to the person who for the time being was the holder of, and produced the pawn ticket, was, by the 25th section of the Act, indemnified for so doing against all the world, including, of course, the true owner, and that the notice and demand served upon him whilst the pledge was yet in his custody, operated as nothing in the absence of such a declaration as is prescribed in s. 21, and the form of which is given (No. IV.) in the 3rd schedule to the Act.

It was not, and could not be denied, that at common law the plaintiffs would be entitled to recover. They were the owners of the article pledged, and entitled to the possession of it, for the bailment to Smith, the pawner, had been determined when it was pledged to the defendant: see *Cooper* v. *Willomatt* (1), where it was held that on a wrongful sale by a bailee to a bonâ fide vendee, the latter was liable in trover to the bailor. Here, instead of a wrongful sale, there was a wrongful pledge; but the same law applies, and the delivery back to the pawner after notice of the plaintiffs' title and demand was clearly a wrongful conversion, unless it was protected by the provisions of the 25th section: see *Peek* v. *Baxter* (2); *Packer* v. *Gillies* (3); *Hoare* v. *Parker*. (4)

In construing the provisions of the Pawnbrokers Act, 1872, some assistance will be derived from a clear understanding of the relations between the pawner and pawnee independently of all statutory enactment. In the case of an ordinary pledge there is no doubt an implied undertaking on the part of the pledgee to redeliver to the pledger the article pledged on payment by the latter of the sum advanced, with interest; but there is on the other hand an implied undertaking on the part of the pledger that the property pledged is his own, or that he has the authority of the owner to pledge it, and that it may be safely delivered back to him. The undertaking on the part of the pledgee to redeliver, however, is not an absolute one, but is subject to this—that the pledger has the title he warrants himself to have, and if it turns out that he is not the owner, and had no authority from

(1) 1 C. B. 672.
(2) 1 Stark, 472.
(3) 2 Camp. 336, n.
(4) 2 T. R. 376.

him to pledge, the pledgee may restore the property pledged to the person lawfully entitled to it: see *Cheesman* v. *Exall.* (1)

Further assistance to a correct understanding of the statute, and the intention of the legislature will be acquired by bearing in mind one or two matters of common knowledge relating to pledges and pawn tickets.

In the first place, it is a very common occurrence for a pawner to dispose by sale or gift of his pawn ticket to another person, with the intention to confer upon the vendee or donee a right to redeem the article pledged; and by the accidents of life it constantly happens that the pawner loses or accidently destroys his ticket, or has it stolen or fraudulently obtained from him. It is also a very common practice for the owners of articles upon which they desire to obtain loans to employ other persons to pledge such articles for them, in which case the person so employed, and who actually delivers the article to the pawnbroker, is in law the pawner, and in his name the ticket is made out, and it not rarely happens that this ticket is retained by the pawner and not delivered over to the employing owner. It was to meet such and similar contingencies (among other things) that the Pawnbrokers Act, 1872 (in substitution of the Acts which previously existed upon the subject) was passed—partly for the protection of pawnbrokers, partly also for the protection of pawners and owners of property pledged.

We come now to consider the provisions of the statute itself, in construing which it must be constantly borne in mind that it recognises a clear distinction between the pawner of goods and the owner for whom or by whose consent they are pawned. This is apparent on reading the 12th section, which makes it imperative upon the pawnbroker to keep such books as are described in the 3rd schedule—by reference to which it will be seen that in the pledge book (Form No. 1) the name and address of the pawner (who by s. 5 is defined as "a person delivering an article for pawn") and also the name and address of the owner, "if other than the pawner," are required to be inserted in separate columns. It is obvious that in using the word "owner" in the form in which the pledge book is to be kept, the legislature contemplate only

(1) 6 Ex. 341, per Pollock, C.B., and Parke, B.

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the owner assenting to or on whose behalf the pledge is made, for it would be absurd to suppose they would recognise the taking by a pawnbroker knowingly of a pledge without the owner's assent. By the 14th section a pawnbroker is required to give to the pawner a pawn ticket, and he is prohibited from taking a pledge in pawn unless the pawner takes the pawn ticket; and on reference to the form of ticket given in schedule 3 it will be seen that the name of the pawner is inserted and not that of the owner.

By s. 16 every pledge is redeemable within twelve months from the day of pawning; the Act does not say by whom the pledge is redeemable, but it is obvious that primâ facie the pawner who makes the pledge is the person to redeem it; for the contract, as we have pointed out, is between him and the pawnbroker.

We now come to the 25th section, upon which we think great light is thrown by the matters to which we have adverted. It enacts that "the holder for the time being of a pawn ticket shall be presumed to be the person entitled to redeem the pledge, and subject to the provisions of this Act, the pawnbroker shall accordingly (on payment of the loan and profit) deliver the pledge to the person producing the pawn ticket, and he is hereby indemnified for so doing;" and it is followed immediately by s. 26, which enacts that "a pawnbroker shall not (except as in this Act provided) be bound to deliver back a pledge unless the pawn ticket for it is delivered to him."

It is clear to our minds that in these two sections the legislature intended only to provide for the delivery back of the article pledged to the person entitled to redeem, and as between the pawner and the pawnbroker to compel the latter to recognise, in the absence of grounds for belief to the contrary, the possessor of the ticket as the person so entitled, and to presume him to be the lawful holder of it without further investigation of his title; and, should it so happen that the ticket is presented and the pledge redeemed by a person who has in fact no title to the ticket, to protect and indemnify the pawnbroker against any claim by the real pawner, or anybody to whom he may have transferred his title, or the owner who has sanctioned the pledge. This construction seems to us to give full effect to, and to be the true interpretation of the 25th section. In our judgment that section

in no degree affects an owner whose property has been pledged against his will. He is in no sense a person entitled to redeem the pledge, or privy to the contract of pawn. His claim rests on a title paramount, which is unaffected by the dealing between the pawnbroker and his customer. The 25th section does not say that the holder of the ticket shall be presumed to be the owner, but that he shall be presumed to be the person entitled to redeem, or in other words, the person entitled to represent the pawner whose title is altogether inconsistent with that of an owner whose property has been unlawfully pledged against his will.

To our mind it is very clear that the legislature did not in the sections relating to the redemption of pledges intend prejudicially to affect the rights of such owners as we have last referred to, otherwise a valuable jewel pledged for a sum of 5*s.* or 10*s.* by a fraudulent person without title would if unredeemed within a year become under s. 17 the pawnbroker's absolute property. A state of things too monstrous to bear a moment's serious consideration.

In the course of the argument there was much discussion upon the 29th section of the Act. In that section we find nothing militating against the views we have expressed; that section was, as is stated in the preamble to it, intended for the protection of owners of articles pawned, and of pawners not having their pawn tickets to produce, that is to say, persons entitled to redeem but who for some reason or other are unable to produce their tickets, and it points out the machinery by which the protection is made available.

The first words of sub-s. 1 evidently contemplate the case of such an owner as the Act requires to be named in the pledge book to which we have referred, viz., an owner whose property has been pledged by his authority, and which therefore of course must be redeemed before the pawnbroker can be called upon to deliver it back. It is true the section does not in terms limit its operation to such owners, and we can well understand and appreciate the reason for this. It probably is that the legislature had it in view to enable an owner whose goods are pawned without his authority, if he thinks fit so to do, to put himself in the same position as an owner whose goods have been pawned by his consent, that is to

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say to abandon his legal right and adopt the pledge, and so give himself a title to redeem it, as many a person would doubtless gladly do where an article of value is pledged for a trifling sum, rather than incur the trouble and expense of insisting upon his paramount title. But if an owner avails himself of this privilege, which it is at his option to do, he must adopt the machinery provided for him. We do not deem it necessary further to discuss that section, in which not a syllable is to be found indicative of an intention to interfere with the common law right of owners of property unlawfully pledged. The 30th and 36th sections appear to us only to afford additional protection to such owners.

After much consideration we have arrived at the conclusion that the 25th section justifies the pawnbroker only to this extent, viz., in treating the holder of a pawn ticket as the person lawfully entitled to hold it, and that the indemnity given by that section is limited to and protects the pawnbroker only against the pawner, the owner who has authorized the pledge, and all those who claim title under them, and that none of the provisions of the statute were intended to affect nor do they affect the common law right of an owner of property pledged against his will who claims by title paramount to that of the pawner.

The appellants, the plaintiffs, are therefore entitled to our judgment.

Judgment for the plaintiffs.

Solicitor for plaintiffs: *J. N. Mason.*
Solicitor for defendant: *C. Thorpe.*

BOLDERO AND ANOTHER *v.* THE LONDON AND WESTMINSTER LOAN AND DISCOUNT COMPANY, LIMITED. 1879 *Nov.* 17.

Fraudulent Conveyance—13 *Eliz. c.* 5—*Delaying Creditors.*

20 Ch D 391

Debtors in insolvent circumstances executed a deed by which they conveyed all their estate to trustees on trust to sell in such manner as they might think proper, and to divide the residue of the proceeds after paying expenses rateably among the creditors parties to the deed, and, if the trustees thought fit, creditors who refused or neglected to execute, and, if the trustees thought proper but not otherwise, to pay the dividends on debts due to non-assenting creditors to the debtors. The deed provided for the payment of maintenance to the debtors if the trustees thought fit, and the executing creditors respectively indemnified the debtors and the trustees in respect of the bills of exchange and promissory notes made or indorsed to them respectively by the debtors in respect of the scheduled debts:—

Held, that the deed was not void under 13 Eliz. c. 5.

Spencer v. *Slater* (4 Q. B. D. 13) distinguished.

SPECIAL CASE stated in an interpleader issue between the plaintiffs, the trustees under a deed of assignment hereinafter mentioned, and the defendants, the execution creditors of the assignors.

The facts, so far as material to the points decided, were as follows:—

In July, 1877, Edward Boldero and William Percy Foster, who carried on business in partnership as printers, and are hereinafter called "the debtors," obtained from the defendants a loan of 50*l.* upon the security of a bill of sale of engines, boilers, and other machinery and effects of the debtors at their place of business, 1, Great Dover Street, Borough, and by way of further security the debtors and the plaintiff, Samuel Bleach, as surety for them gave their joint and several promissory note to secure the sum of 62*l.* 10*s.* The loan and interest were repayable by monthly instalments. The bill of sale was not registered.

On the 10th of July, 1878, a deed was made between the debtors of the first part, the plaintiffs, as trustees for the creditors of the debtors who might become parties thereto, of the second part, and the several persons being creditors whose names were thereunto subscribed of the third part.

The deed assigned all the debtors' estate and effects to the

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trustees upon trust to sell the same, and out of the moneys to be received to pay the rates and taxes, salary and wages of any clerk of the debtors, the costs and charges incurred previous to the execution of the assignment in relation to the effects or affairs of the debtors, and the costs and charges of the assignment, the composition on debts not exceeding 10*l.*, and "to make or pay to the debtors such allowance for their maintenance or otherwise as the trustees may think fit, and then to divide the balance of such moneys so to be received rateably among the creditors parties hereto in proportion to the sums set after their names, including as such creditors, if the trustees shall think fit but not otherwise, such persons as are creditors of the debtors who may have refused or neglected to execute these presents, and to pay the dividends on the debts due to such last-mentioned creditors who are not parties hereto to the debtors if the trustees think proper but not otherwise; and it is hereby declared that it shall be lawful for the trustees as they in their discretion may think proper to return to the debtors all or any part of their household furniture and effects, and to employ any person or persons in carrying out the trusts aforesaid and in carrying on the trade if thought expedient, and to pay to such person or persons in carrying out the trusts aforesaid and in carrying on the trade if thought expedient out of the said trust moneys any sum or sums of money." The deed contained also a declaration that the trustees should not be answerable the one for the other, nor for any loss or damage which may happen in or to the trust estate.

The deed contained the following covenant: "The said several creditors do hereby respectively covenant with the debtors, their executors and administrators, that they the said creditors respectively will indemnify the debtors, their executors and administrators, and the said trustees, their executors, administrators and assigns, from and against the several bills of exchange and promissory notes which have been accepted, made or indorsed and delivered to them respectively by the debtors, for or in respect of the said debts or sums set after their names respectively, and from all costs which might be occasioned by the non-payment thereof," and the creditors further in consideration of the assignment and covenants released the debtors from all debts, actions, &c., which

they (the creditors) might have in respect of any transaction up to the date of the assignment.

The plaintiffs accepted the trusts of the indenture, and the keys of the premises were given to one of them, and they advertised the business for sale and endeavoured to sell it with the plant and stock-in-trade as a going concern, but the debtors were allowed to continue in apparent possession of the stock-in-trade and other property comprised in the assignment, and continued to carry on such business as they were doing at the time of the assignment without any ostensible interference by the plaintiffs.

At the time of the execution of the assignment the debtors were traders within the meaning of the Bankruptcy Act, 1869, and were in insolvent circumstances. Some of the instalments due to the defendants had been paid, and the debt had been reduced to 39*l.* 10*s.* The defendants did not execute or assent to the assignment, though asked to do so. The whole amount of the debts of the debtors was 432*l.* 15*s.* 5*d.*, and creditors to the amount of 363*l.* 1*s.*, including the plaintiffs, who were creditors to a large amount, assented to and signed the deed.

The assignment was executed for the purpose of enabling the business of the debtors to be sold as a going concern, by which it was estimated it would have realised 50 per cent. more than if the plant and stock-in-trade had been sold separately, and also for the purpose of securing the equal distribution of the proceeds of the sale amongst all the creditors of the debtors. The defendants contended that it was executed for the purpose of defeating any executions which might be levied on the debtors' property, and of defeating the defendants' bill of sale, and they relied on the provisions of the assignment as shewing such intention. The plaintiffs contended that this was not so. The facts were that default had been made in payment of the monthly instalments due under the bill of sale in May and June, 1878. No creditor (except creditors who assented to the assignment) was pressing the debtors. A judgment creditor had put in an execution on Boldero & Foster's goods, and they, with the two largest creditors, then consulted a firm of solicitors, who advised that nothing could be done till the judgment creditor was paid. The debtors possessed no ready money, but they succeeded in borrowing some for

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the purpose, and paid the execution creditor out. The assignment was then executed at the suggestion and under the advice of the solicitors who prepared it, and who were instructed by the debtors and the two creditors to the largest amount. The solicitors did not then know, and were not informed until some time afterwards, of the bill of sale having been executed to the defendants. The debtors and the plaintiff Bleach, who knew the fact, did not know whether or not the bill of sale would be defeated by the assignment, and had no intention one way or the other upon the question of defeating the bill of sale, which was not present to their minds. The debtors desired to do what they were advised was best for their creditors, and denied that they had any intention of giving any preference to any one or more of their creditors over any other one or more of them, or of defeating or delaying any one or more of their creditors. The assignment was not registered as a bill of sale.

In September, 1878, default had been made by the debtors in payment of four instalments due under the bill of sale, and the defendants, besides seizing and placing a man in possession of the stock-in-trade and effects comprised therein, issued a writ against one of the debtors and obtained judgment, under which the goods were seized. Notice was given to the sheriff of the claim of the plaintiffs to the goods, and he interpleaded.

The Court were to have power to draw inferences of fact; and the question for their opinion was whether the goods seized by the sheriff, or any of them, were at the time of the seizure the property of the plaintiffs as against the defendants.

Channell, for the plaintiffs, contended that the assignment was for the benefit of the creditors of the person making it, and within the exception of s. 7 of 17 & 18 Vict. c. 30, and was therefore not a bill of sale: *General Furnishing and Upholstery Company* v. *Venn* (1); and that the assignment was not void under 13 Eliz. c. 5: *Alton* v. *Harrison* (2); and distinguished the case from *Spencer* v. *Slater*. (3)

Clay, for the defendants, contended that the assignment should

(1) 2 H. & C. 153. (2) Law Rep. 4 Ch. 622.
(3) 4 Q. B. D. 13.

be for the benefit of all creditors, and that the resulting trusts in favour of the debtors tended to defeat or delay creditors who had not assented.

Channell, was not heard in reply.

POLLOCK, B. I think no reasonable doubt can be entertained in this case. The question whether the goods were the property of the plaintiffs depends on whether the assignment of the 10th of July, 1878, whereby the debtors assigned to the plaintiffs as trustees for the creditors, can be upheld. Two grounds were taken, the first of which was that the assignment was unregistered. The answer to this is clear, that this deed was within s. 1 of the Bills of Sale Act, and also within the interpretation of s. 7 as an assignment for the benefit of creditors. If any authority were necessary for this proposition it would be found in the case of *General Furnishing and Upholstery Company* v. *Venn* (1), where it was held that a deed intended to operate under the then existing Bankruptcy Act was good as an assignment at common law for the benefit of all the creditors. The other question is, whether the assignment comes within 13 Eliz. c. 5, and is fraudulent and void under that statute as tending to defeat or delay creditors.

The case before us is not like that of *Spencer* v. *Slater* (2) for there is this great distinction, that here the primary object was a transfer for purposes of sale as a going concern, and not for the purpose of carrying on the business. It is quite true that the trustees, in the event of their not being able to sell the business at once, would be obliged to keep it going, and for this reason power is given them to pay to the debtors such allowance for their maintenance or otherwise as the trustees may think fit, and this under the circumstances is a necessary power. The defendants further rely on the general tendency of the deed itself, and argue that on the whole the deed sweeps away all that the creditors have to look to, and so defeats the claims of such of them as are not assenting. But we are here dealing, not with the bankruptcy law, but with the statute of Elizabeth, and, without going back to older cases, as Lord Justice Giffard pointed out in *Alton* v. *Harrison* (3), the statute of Elizabeth does not touch the question

(1) 2 H. & C. 153. (2) 4 Q. B. D. 13.

(3) Law Rep. 4 Ch. 622.

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of equal distribution of assets. This assignment therefore, though it preferred certain creditors and tended to defeat the others, might be good.

In *Spencer* v. *Slater* (1) there were special circumstances. In the first place, the deed contained not merely the ordinary resulting trusts as to the surplus which would be found in every deed, but a resulting trust, under which at the expiration of twelve months the debtor might apply to the trustees to be paid the dividends of creditors who neglected or refused to assent to or execute the deed, and then, if the creditors did not within seven days assent or execute, the money was to be paid to the debtor; this was clearly much beyond the ordinary resulting trust: then again, as I have already mentioned in that case, the primary trust was to carry on the business, here the principal object is to sell the business, and it is subsidiary to that object that power should be given to carry it on till the sale. In that case too there was a very special and general indemnity. It is quite right that trustees should be indemnified in certain cases, such, for instance, as their having to indorse bills of exchange, and that is what is found in this case. The indemnity in *Spencer* v. *Slater* (1) went very much further, and from all the circumstances of that case taken together the Court came to the conclusion that they ought to draw the inference that the assignment was intended to defeat creditors, and was therefore void under the statute of Elizabeth. The circumstances here are, as I have pointed out, very different, and would not warrant us in arriving at the same conclusion. Our judgment will therefore be for the plaintiffs.

HUDDLESTON, B., concurred.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Heather & Sons.*
Solicitors for defendants: *G. J. & P. Vanderpump.*

(1) 4 Q. B. D. 13.

[IN THE COURT OF APPEAL.]

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Nov. 15.

STEVENS *v.* SAMPSON.

Libel—Privileged Communication—Report of Proceedings before a Court of Justice.

A true report of the proceedings in a Court of Justice sent to a newspaper by a person, who is not a reporter on the staff of the newspaper, is not privileged absolutely; and if it be sent from a malicious motive an action will lie.

CLAIM for falsely and maliciously printing and publishing of the plaintiff certain words in certain newspapers. The libel set out in the claim was a report, published by the defendant, of certain proceedings in a plaint of *Nettlefold* v. *Fulcher*, tried at the Marylebone county court, and brought to recover damages and costs sustained by Nettlefold in setting aside certain proceedings instituted by Fulcher against Nettlefold to recover the possession of certain premises. It alleged that at the county court the defendant in the present action appeared for Nettlefold, and made statements regarding the conduct of the plaintiff in the present action, who was a debt collector and employed by Fulcher as agent to recover possession of the premises.

Statement of defence: 1. A denial that the defendant published the words. 2. That the words alleged to have been published were a true and correct account and report of a certain trial in a court of justice having jurisdiction in that behalf, and of certain words spoken during the sitting of the Court in the course of the trial, and published for the public benefit, and without malice. 3. That the matters alleged to have been published were true in substance and in fact, and a denial that the plaintiff had sustained any damage. Issue thereon.

At the trial before Cockburn, C.J., at the Hilary Sittings, 1879, at Westminster, it was proved that the defendant, who was a solicitor, had sent the report set out in the claim of the trial of *Nettlefold* v. *Fulcher*, before the Judge of the Marylebone county court, to the local newspapers. Cockburn, C.J., left two questions to the jury: 1. Was the report a fair one? 2. Was it sent honestly, or with a desire to injure the plaintiff? The jury

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answered these questions: 1. That it was in substance a fair report: 2. That it was sent with a certain amount of malice: and found a verdict for the plaintiff with 40s. damages. Cockburn, C.J., directed judgment to be entered for the plaintiff for that amount.

The defendant appealed on the ground that the judgment entered upon the findings of the jury was wrong; and that it should have been directed to be entered for the defendant, the jury having found that an alleged libel, being a report in certain newspapers of proceedings which took place in a court of justice, was a fair report of the proceedings.

Harris, and *Poulter*, for the defendant. The judgment ought to be entered for the defendant, for a true report of proceedings in a court of justice is privileged absolutely, *Hoare* v. *Silverlock* (1); *Lewis* v. *Levy*. (2) The motive that the defendant had for sending the report is immaterial. All the public have a right to be present in a court of justice and hear the proceedings. The defendant by the publication of the report has made the proceedings, which were accessible to all who were present, universally known. The publication, though to the disadvantage of a particular individual, is of importance to the public, and it is, therefore, privileged. It would appear from a dictum of Lord Campbell in *Andrews* v. *Chapman* (3), that the publication of proceedings in a court of justice is absolutely privileged; he says, "if what is stated is substantially a fair account of what took place, there is an entire immunity for those who publish it:" and Coleridge, J., expressed the same view in *Smith* v. *Scott*. (4)

J. E. Palmer and *Ladbury*, for the plaintiff, were not called upon.

LORD COLERIDGE, C.J. The question before us is whether, on the findings of the jury, the entry of the judgment for the plaintiff is right. I am of opinion that it was rightly entered for the plaintiff. The principle which governs this case is plain. It is like that which governs most other cases of privilege. In order, in cases of libel, to establish that the communication is privileged,

(1) 9 C. B. 20; 19 L. J. (C.P.) 215.
(2) 27 L. J. (Q.B.) 282.
(3) 3 C. & K. 286, at p. 289.
(4) 2 C. & K. 581, at p. 585.

two elements must exist; not only must the occasion create the privilege, but the occasion must be made use of bonâ fide and without malice; if either of these is absent, the privilege does not attach; here the second element is absent, for bona fides is wanting, and malice exists. There are certain cases in which the privilege is absolute. Words spoken in the course of a legal proceeding by a witness or by counsel, and words used in an affidavit in the course of a legal proceeding are absolutely privileged. It is considered advantageous for the public interests that such persons should not in any way be fettered in their statements. This is the first time that a report of proceedings in a court of justice has been sought to be brought within this same class of privilege. I am not disposed to extend the bounds of privilege beyond the principles already laid down, and I find no authority for its extension.

BRAMWELL, L.J. I am of the same opinion. The publication complained of is a libel. It comes within the definition of a libel, and the jury have found that it is a libel. The only defence is that the publication is privileged. The term "privilege" is a word often used very inaccurately. In this particular case it is said the libel is a fair and correct report of certain proceedings in a court of justice, at which the public have a right to be present, and that its publication was with a view of giving information to the public, and therefore the communication is privileged; but it must be shewn that the defendant did act under the privilege. The jury have found that the report was sent with a certain amount of malice. The defendant did not act under the privilege; his motive for the publication was not a desire to give information to the public. Cases may be put of an answer to an application for the character of a servant, and the sending of a report of proceedings to a newspaper by an ordinary reporter. Suppose a man be applied to for the character of a servant, and he is angry with that servant, and says "he is a bad servant, he has stolen my spoons;" that communication would be privileged if the man has acted bonâ fide, intending honestly to discharge a duty. It is a privilege created by the application of the servant. It must be taken that he said what he did in answer to what

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was asked of him by the servant through the new master. So in the case of an ordinary reporter of a newspaper. But the present is not a case of the privilege of the press. If the defendant can justify himself here, it would be a justification whether the publication was in a book or in a newspaper. He would be in the same plight that he is now. Suppose a reporter for the press bore malice towards a person, a party to an action, and published a fair report of proceedings injurious to him, I incline to think that, as he would be performing a kind of duty, it ought to be taken that he is acting under privilege. I do not think the public press has any peculiar privilege. However, I only throw this out as a suggestion, and it is unnecessary to decide the point. There is, however, a plain distinction between that case and the present, where the defendant is a volunteer. I think, therefore, the jury having found that the defendant was not acting under the privilege, he is liable to the action.

BRETT, L.J. It seems to me that the verdict of the jury means that the defendant did not send this report to be published for the benefit of the public in a matter as to which they ought to be informed, but from a desire to injure the plaintiff. Assuming the report to be a fair and correct account of the proceedings in a court of justice, was it privileged? It seems to me that, whatever privilege is relied upon in an action, the defendant is bound to prove that the occasion is privileged, and that he used the occasion in a privileged way. He is bound to shew that he used the privilege bonâ fide and without malice; if he fails in either of these incidents, he fails to shew that the communication is privileged. The defendant, in order to establish his defence, must shew that the report was substantially correct and that this substantially correct report was made without malice. It is said that the publication of proceedings in a court of justice is a case of absolute privilege, but there is no authority for that statement, and the case comes within the general rule. The defendant has failed to make out the defence he has put on the record.

Judgment affirmed.

Solicitor for plaintiff. *T. Johnson.*
Solicitor for defendant: *The defendant in person.*

GILBERTSON, APPELLANT; FERGUSSON, RESPONDENT. 1879

July 4.

Income Tax—Foreign Corporation—Dividends payable to Shareholders in the United Kingdom—Money intrusted to Agents for Distribution—16 & 17 *Vict. c.* 34, *s.* 10.

A foreign company, carrying on business and earning profits abroad, had an agency in London, which conducted a branch and earned profits. The dividends of the company were payable, at the option of the shareholders, abroad or by the London agency. In a particular year the London agency earned an amount of profits which enabled them to pay all the dividends demanded of them in that year, without requiring or obtaining any remittance from the company abroad. The London agency were assessed to income tax under Schedule D on the profits earned in the United Kingdom on an average of the three preceding years, the amount on which they were so assessed being less than the amount actually earned by them in the year. They further made a return under 16 & 17 Vict. c. 34, s. 10, that no interest, dividends, or other annual payments, payable out of or in respect of the stocks, funds, or shares of the company, had been intrusted to them for payment in the United Kingdom, and appealed against an assessment of the commissioners whereby they were assessed in respect of the dividends paid by them:—

Held, by a majority of the Court (Pollock and Huddleston, BB.), that the money in the hands of the London agency for the payment of dividends in the United Kingdom was intrusted to them within the meaning of 16 & 17 Vict. c. 34, s. 10, and they were liable to be assessed on the full amount of such dividends, but that since the dividends were payable out of the general earnings of the company, consisting of profits made partly in the United Kingdom and partly elsewhere, and the London agency had already been assessed to income tax on the former under Schedule D., they ought only to be further assessed, under 16 & 17 Vict. c. 34, s. 10, and pay income tax, in respect of that portion of the dividends which represented profits arising out of the United Kingdom.

By Kelly, C.B. (dissenting), that the money in the hands of the London agency having sufficed to pay the dividends payable in the United Kingdom, no money had been intrusted to the London agency for that purpose within 16 & 17 Vict. c. 34, s. 10.

CASE stated for the opinion of the Court by the commissioners for the special purposes of the Income Tax Acts.

1. The question for the opinion of the Court is, whether any portion of the profits made out of the United Kingdom by a Turkish corporation carrying on business in Constantinople, London, and elsewhere, under the name of the Imperial Ottoman Bank, and not actually remitted to the United Kingdom, is, as profits, or as forming part of dividends paid in the United Kingdom, the subject of assessment to income tax under schedule D

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of the Act 16 & 17 Vict. c. 34, in the circumstances hereinafter appearing, and, if any, then whether either of the assessments for the year 1874–75, which have been made by the commissioners for special purposes on the appellant has been made upon the right principle, or upon what principle an assessment should have been made.

3. By the Act 16 & 17 Vict. c. 34, certain duties are granted to her Majesty upon profits arising from property, professions, trades and offices (inter alia), s. 2.

SCHEDULE D.

For, and in respect of the annual profits or gains arising or accruing to any person residing within the United Kingdom, from any profession, trade, employment, or vocation, whether the same shall respectively be carried on within the United Kingdom or elsewhere.

And for and in respect of the annual profits or gains arising or accruing to any person whatever, whether a subject of her Majesty or not, although not resident in the United Kingdom, from any profession, trade, employment, or vocation exercised within the United Kingdom.

4. By s. 5 of 16 & 17 Vict. c. 34, the duties imposed by that Act are directed to be assessed under the regulations of 5 & 6 Vict. c. 35, and the Acts therein mentioned or referred to.

5. By s. 23 of 5 & 6 Vict. c. 35, provision is made for the appointment of commissioners for the special purposes of that Act. (1)

19. By 5 & 6 Vict. c. 80, s. 2, all persons intrusted with the payment of annuities or any dividends or shares of annuities payable out of the revenue of any foreign state to any persons, corporations, companies, or societies in Great Britain, or acting therein as agents, or in any other character, are to deliver to the commissioners for special purposes true and perfect accounts of the amount of the annuities, dividends and shares payable by them respectively, and the commissioners are to make an assessment thereon, and the persons intrusted with such payments are to pay the duty on the annuities, dividends and

(1) A number of the sections of this Act were set out in the case, which it is unnecessary to insert in the report.

shares on behalf of the persons, corporations and companies entitled unto the same out of the moneys in their hands.

20. By 16 & 17 Vict. c. 34, s. 10, the provisions of the last mentioned Act for the assessing and charging the duties on dividends and shares of annuities payable out of the revenue of any foreign state are extended to all interest, dividends or other annual payments payable out of or in respect of the stocks, funds or shares of any foreign company, society, adventure or concern, or in respect of any securities given by or on account of any such company, society, adventure or concern, which interest, dividends or annual payments have been or shall be intrusted to any person in the United Kingdom for payment to any persons, corporations, companies, or societies in the United Kingdom, and all persons intrusted with the payment of any such interest, dividends or other annual payments as aforesaid in the United Kingdom, or acting therein as agents, or in any other character, shall do and perform all such acts, matters and things in order to the assessing and charging and paying of the said duties on all such interest, dividends and other annual payments as aforesaid, as by the said Act of 5 & 6 Vict. c. 80, persons intrusted with the payment of annuities or any dividends or shares of annuities are required to do and perform.

21. By a series of subsequent Acts the duties of income tax granted by 16 & 17 Vict. c. 34, have been continued at various rates until the present time. The Act imposing the duty for the year ending on the 5th of April, 1875, was The Customs and Inland Revenue Act, 1874 (37 & 38 Vict. c. 16).

22. Towards the close of the year 1862 the Ottoman Bank of London, which was a banking company established in London, and carrying on business there with a branch at Constantinople arranged to transfer its business to the Imperial Ottoman Bank, which was a Turkish corporation incorporated according to the laws of Turkey by a firman of the Sultan.

23. The transfer of the business was completed in the beginning of the year 1863 by the issue of shares in the capital of the Imperial Ottoman Bank to the amount of 250,000*l.* to the shareholders of the Ottoman Bank of London, and the business in London of the Imperial Ottoman Bank as bankers was then

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commenced in London under the management of the London members of the committee, hereinafter referred to, in the premises theretofore occupied by the Ottoman Bank of London; the remainder of the capital was subscribed in Constantinople, Paris, London, and other places. Immediately on the formation of the Imperial Ottoman Bank preparations were made to commence business in Constantinople, and it actually commenced business there on the 1st of June, 1863.

24. The affairs of the Imperial Ottoman Bank (hereinafter called the bank) were regulated by a concession from the Government of Turkey and certain statutes of the 17th of February, 1875.

25. By the concession, the bank is a State bank for the Ottoman Empire, and is established subject to the general laws of the Empire, with its seat fixed at Constantinople, and power to establish branches and agencies at other places, and it is provided that the bank shall be administered at Constantinople by a board of two or three members, and a council of administrators of three members, both to be named by a committee, chosen by the London and Paris founders, and this committee is to have power in conformity with the statutes to guide, control and superintend the operations of the bank.

26. By the statutes above referred to, it is declared that the bank is formed for the purpose of carrying into effect the privilege of the bank as defined in the concession, and the operations to be undertaken are defined in accordance with the concession. The capital of the bank is divided into shares of 500 francs, or 20*l.* each, and the liability of the shareholders is limited to the amount of their shares. There is no register of shares, but, according to the provisions of the statutes, all the certificates of shares are made out to bearer, and the shares themselves are transferable by delivery of the certificates, and the dividends payable thereupon are payable at the option of the holders at Constantinople, Paris or London, by means of coupons attached to the certificates.

27. By the statutes the administration of the bank in Constantinople is confided to a director general, one or two assistant directors, and a council of administration of three directors. These are appointed by a committee of from twenty to twenty-five members, of whom ten at least must be English, or resident

in England, and ten at least French, or resident in France. This committee has the general guidance, control and superintendence of the operations of the bank, and its members are elected by the general meeting of shareholders. The statutes further require that the committee shall meet four times a year alternately in London and Paris, and the committee has, in fact, met and still does meet sometimes in London and sometimes in Paris. The execution of the decisions of the committee and the more immediate supervision of the affairs of the bank is assigned under the statutes to a sub-committee appointed by a general committee, consisting of eight members, of whom four are chosen from the English and four from the French section of the general committee.

28. It is provided by the statutes that the English members of the committee shall be charged under the control of the sub-committee with the management of the London agency of the bank, and since the early part of 1863, when the business of the bank in London commenced until the present time, the London business of the bank, being the ordinary business of bankers, has been carried on under the management of the English members of the committee in premises in the city of London.

29. It is provided by the statutes that the annual general meetings of the shareholders in the bank, and all extraordinary general meetings shall be held at such places as the committee shall fix, and at the annual general meetings the report of the committee on the state of affairs of the bank is received, the accounts are discussed, approved or rejected, the dividends are fixed and declared, and members of the committee are elected. The general meetings have in fact always been and still are held in London.

30. According to the translation of the statutes furnished to the commissioners for special purposes articles 41 and 42 of these statutes are in the terms following:—

"Article 41. At the end of each of the company's years, a general inventory of the assets and liabilities is drawn up by the sub-committee and confirmed by the committee. The accounts are submitted to the general meeting which approves or rejects and fixes the dividends after having heard the report of the committee.

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"Article 42. The net proceeds after deducting all expenses constitute the profits. Out of these profits there is taken, in the first instance, annually—

"1st. Five per cent. on the capital of the shares issued to be distributed among the shareholders by way of dividend on account.

"2nd. Ten per cent. of the profits for the reserve fund.

"The surplus is divided in the proportions of nine-tenths for the shares by way of dividend, the remaining one-tenth is divided into moieties, of which one is for the founders and the other for the members of the committee and the administrative council.

"The part coming to the founders in the division of the annual profits and in the reserve fund shall be in the proportions fixed by their private agreements represented by special certificates whose form the committee shall determine; the payment of the dividends voted by the general meeting is made at the times fixed by the committee."

32. On or about the 16th day of November, 1875, two returns for income tax for the year ending the 5th of April, 1875, were made by the appellant, one being in respect of the English profits of the bank, and the other being in respect of the dividends of the bank.

The return in respect of the English profits was:—

"The London Agency act in the character of agents for the Imperial Ottoman Bank, which resides at Constantinople in the empire of Turkey.

"The amount of profits and gains accruing to the bank from the trade of banker exercised within Great Britain, viz., at London for the year ending the 5th of April, 1875, computed on a just and fair average of three years ending the 31st of December, 1873, the last mentioned day being the day on which the accounts of the said bank have been usually made up, is 81,477*l.* 14*s.* 8*d.*

The return in respect of the dividends of the bank was:—

"There were no interest, dividends or other annual payments payable out of or in respect of the stocks, funds, or shares of the said Imperial Ottoman Bank, and (within the meaning of the said Act (1)) intrusted to the said London Agency, for payment

(1) 16 & 17 Vict. c. 34, s. 10.

to persons, corporations, companies, or societies, in the United Kingdom, and payable by the said London Agency, for the year ending the 5th of April, 1875."

34. Before and at the time when the above returns were transmitted to the surveyor of taxes (the respondent) the secretary of the London Agency furnished a statement, shewing how the sum of 81,477*l.* 14*s.* 8*d.*, mentioned in the return in respect of the English profits, was arrived at, such statement being as follows:—

The English profits for the year ending—

31st December, 1871, were .	£69,118	1	0
„ 1872 . .	76,070	18	10
„ 1873 . .	99,244	4	4
3)	244,433	4	2
Return for 1874–75 .	£81,477	14	8

and a further statement of the amounts of dividends paid in England out of the profits of the bank in the course of the financial years 1871–72, 1872–73, 1873–74 and 1874–75, and such amounts were thereby shewn to be respectively 165,344*l.* 10*s.*, 189,694*l.* 10*s.*, 169,081 2*s.*, and 98,322*l.* 10*s.* It was also thereby shewn that in the year 1871–72 there was in the hands of the London Agency money derived from profits made in England amounting to 69,118*l.* 1*s.* which the agency applied towards payment of the said dividends, and that the amount to make up the said sum of 164,344*l.* 10*s.*, viz., 95,226*l.* 9*s.*, was remitted from abroad out of the foreign profits of the bank; that in the year 1872–73 the amounts so applied and remitted respectively were 76,070*l.* 18*s.* 10*d.* and 113,623*l.* 11*s.* 2*d.*; that in the year 1873–74 the amounts so applied and remitted respectively were 99,244*l.* 4*s.* 4*d.* and 69,836*l.* 17*s.* 8*d.*, and that in the year 1874–75 the amount of English profits (145,539*l.* 0*s.* 2*d.*) being in excess of the amount required for the dividends payable in England, no remittance from abroad out of foreign profits was required or made towards payment of the said sum of 98,322*l.* 10*s.*

35. The commissioners for special purposes in the first instance made an assessment for the year 1874–75 (hereinafter called the assessment on English profits) in respect of the profits of the bank

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upon the sum of 81,477*l.* 14*s.* 8*d.* for the English profits in conformity with the return, and duty was charged upon that sum accordingly. This assessment was not objected to and no question arises upon it.

The commissioners then proceeded to consider the return in respect of the dividends of the bank, and were of opinion that in making that return the appellant had taken an erroneous view of the liability of the English committee with reference to the provisions of s. 10 of the Act 16 & 17 Vict. c. 34, and having no information as to the proportion of the said sum of 98,322*l.* 10*s.* paid in dividends in England in the year 1874–75 which represented English profits, and had been included in the assessment on English profits, they made an assessment (hereinafter called the assessment on dividends) upon the whole of the said sum of 98,322*l.* 10*s.*

In giving notice to the appellant of the assessment on dividends the commissioners left the English members of the committee to prove upon appeal what amount should be deducted as having been included in the assessment on the English profits.

36. The appellant on behalf of the English members of the committee or the London Agency, appealed against the assessment on dividends to the commissioners for special purposes, and upon the hearing of the appeal on the 14th day of January, 1876, it was stated by the commissioners that in case s. 10 of the Act 16 & 17 Vict. c. 34, was inapplicable to the bank or did not in circumstances warrant any assessment on dividends, they should, under the authority vested in them by law, make an assessment under the provisions of the third rule applicable to the two first cases of schedule D in s. 100 of 5 & 6 Vict. c. 35, in addition to the assessment on English profits so as to cover the foreign profits of the bank to the extent to which in the opinion of the commissioners they were liable to income tax. It was, therefore, arranged between the commissioners and the appellant that the hearing of the appeal should be adjourned, and that the commissioners should forthwith make such assessment in respect of foreign profits as they should think proper as an alternative assessment, and that an appeal therefrom, and the previous appeal so adjourned should come on for hearing on the same day.

37. On the 20th day of January, 1876, the commissioners for special purposes made an assessment (hereinafter called the assessment on general profits) upon the sum of 115,935*l.*, which they ascertained to be the amount on an average of the three preceding years of the proportion of the foreign profits distributed in dividends in England, and which sum, with the addition of the sum of 81,477*l.* 14*s.* 8*d.*, the amount of the assessment on English profits, amounted to a total assessment in respect of profits of 197,412*l.* 14*s.* 8*d.*

The way in which the commissioners arrived at the foregoing result is shewn by the following statement of account:

1871.	Total dividend paid in England and abroad		£273,375
	Dividend paid in England		£164,344
	English profits		£69,118
	As 273,375 : 69,118 :: 164,344 : 41,551		
	Subtract the 4th term	41,551	
	Portion of English dividend composed of foreign profits	£122,793	
	Composed of English profits	69,118	
	Total profits assessable	£191,911	
1872.	Total dividend paid in England and abroad		£283,500
	Dividend paid in England		£189,694
	English profits		£76,070
	As 283,500 : 76,070 :: 189,694 : 50,899		
	Subtract 4th term	50,899	
	Portion of English dividend composed of foreign profits	£138,795	
	English profits ...	76,070	
	Total profits assessable	£214,865	

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1873. Total dividend paid in England and abroad £202,500

Dividend paid in England £169,081

English profits £99,244

As 202,500 : 99,244 :: 169,081 : 82,865

Subtract 4th term 82,865

Portion of English dividend composed of foreign profits £86,216

English profits ... 99,244

Total profits assessable £185,460

Total profits assessable for 1871 ...	£191,911
Do. „ „ 1872 ...	214,865
Do. „ „ 1873 ...	185,460
3)	592,236
Average for assessment ...	£197,412

In making the assessment the commissioners regarded all the shareholders in the bank who were resident in England, as carrying on business in England and abroad jointly with the shareholders resident abroad, and the English committee as the accountable and chargeable persons under the provisions contained in the third rule applicable to the two first cases of schedule D, in s. 100 of the Act 5 & 6 Vict. c. 35, in respect of the profits of the bank, so far as they were liable to income tax.

38. On the same day on which the assessment on general profits was made, the commissioners for special purposes sent a notice thereof.

39. The appellant signified his intention to appeal to the commissioners for special purposes against the assessment on general profits, and on the 26th day of January, 1876, that appeal and the adjourned appeal against the assessment on dividends came on for hearing.

40. At such hearing it was stated on the part of the appellant

that no technical objection was or would be taken to the assessment or the mode in which they had been made, but that objection was taken upon the simple ground that the whole liability of the appellant and the other English members of the committee either as representing the London Agency of the bank, or on the part of themselves and the other shareholders in the bank in respect of income tax upon the profits of the bank had been discharged by the assessment for the English profits and the payment of income tax upon that sum. In support of that objection it was alleged that it was decided by the Court of Exchequer in the case of the *Attorney General* v. *Alexander* (1) that the bank was chargeable to income tax in respect of the English profits only, and that the bank could not be regarded otherwise than as a person residing out of the United Kingdom and carrying on business in the United Kingdom through an agent. It was further urged that the bank having a foreign incorporation must be regarded as a corporate body or entity for all purposes connected with the income tax and that the commissioners for special purposes had no power to make any assessment upon the shareholders in the bank in respect of these dividends or shares of the profits thereof. It was further urged that the provisions of the Income Tax Acts, with the exception of the provisions contained in s. 10 of the Act, 16 & 17 Vict. c. 34, were such as to restrict the obligation of the agent of a foreign corporation to make a return of profits of the corporation to a return of the profits made in the United Kingdom, and consequently to restrict the charge of income tax to the profits so made. It was further urged that inasmuch as all dividends paid in the United Kingdom in the year 1874–75 were paid out of English profits retained by the English members of the committee for the purpose, no dividends payable on the shares of the bank were intrusted to such members or any person for payment in the United Kingdom, and that consequently no return could be called for and no assessment could be made by reference to the said s. 10 of the Act, 16 & 17 Vict. c. 34.

41. It was submitted on the part of the respondent that in the case of the *Attorney General* v. *Alexander* (1), the Court of

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Exchequer decided nothing more than that the bank was not chargeable as a person residing in the United Kingdom.

With respect to the assessment on general profits it was urged on the part of the respondent that, where persons (some of whom reside while the others do not reside in the United Kingdom) carry on a concern jointly in the United Kingdom and elsewhere, the annual profits arising to such persons from the concern are chargeable under schedule D of the Act 16 & 17 Vict. c. 34, and the third rule applicable to the two first cases of schedule D, as stated in s. 100 of the Act 5 & 6 Vict., c. 35. And that the fact of such persons having formed themselves into a body which has been incorporated by a firman of the Sultan does not diminish their liability or deprive the Crown of the income tax which would have been payable if there had been no such incorporation. It was also urged that whatever may have been the effect of the Turkish incorporation, it was not such as to bring the bank within the meaning of the expression "bodies politic or corporate," in s. 40 or s. 192 of the Act 5 & 6 Vict., c. 35, or to make the bank chargeable as a company or corporation under the general provisions of the Income Tax Acts.

With respect to the alternative assessment, viz., the assessment on dividends made with reference to s. 10 of the Act 16 & 17 Vict., c. 34, it was urged on the part of the respondent that the appropriation by the English members of the committee, of the whole of the English profits to the payment of dividends to a certain class of shareholders, viz., those whose dividends were paid in London, could not have the effect of depriving the Crown of income tax upon so much of the foreign profits as must be considered to have formed part of such dividends. It was also submitted that the construction of the said s. 10, for which the appellant contended, viz., the limitation of the expression "dividends intrusted" to moneys actually remitted by the bank from abroad for distribution in dividends in London, was manifestly opposed to the intention of the legislature in the application of the section to the case of a foreign corporation, carrying on business and making profits in the United Kingdom and abroad.

42. The commissioners for special purposes concurred in the

views put forward on behalf of the respondent, and upon consideration of the general question involved in the alternative assessments, were of opinion that the contention on the part of the appellant that the assessment on English profits was to be regarded as embracing and satisfying the whole liability of the appellant and the other members of the English committee in every aspect of the case could not be supported in point of law in the state of facts which has been hereinbefore set forth, because the practical result of yielding to such contention would be to free from income tax either the portion of the foreign profits which should be regarded as forming part of each dividend paid to a shareholder in the United Kingdom or the portion of the English profits which should be regarded as forming part of each dividend paid to a shareholder abroad.

The commissioners therefore were of opinion that one of the two assessments, viz., the assessment on dividends, and the assessment on general profits, was right, and, inasmuch as it was the desire of the persons who represented the appellant and the Crown at the hearing of the combined appeals that all the points affecting the liability to income tax should be brought before the Court upon a case to be stated, they determined to confirm the two alternative assessments.

43. The assessments were accordingly confirmed, subject to a case for the opinion of the Exchequer Division of the High Court of Justice according to the Act 37 & 38 Vict., c. 16.

The case was argued on the 28th of February and the 1st and 3rd of March, 1879.

Henry Matthews, Q.C. (*Bosanquet,* with him), for the appellant.
Sir John Holker, A.G. (*Dicey,* with him), for the Crown.

Cur. adv. vult.

July 4, 1879. The Court differing in opinion, the following judgments were delivered:—

HUDDLESTON, B. The legislature has provided by 16 & 17 Vict. c. 34, s. 2, schedule D, that income tax shall be paid on the annual profits or gains arising or accruing from any profession, trade, employment, or vocation by persons residing in the United

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Kingdom, whether the profession, &c., be carried on in the United Kingdom or elsewhere, and by persons whether subjects of her Majesty or not, although not resident in the United Kingdom, where those profits or gains arise or accrue from the profession, &c., exercised within the United Kingdom.

The Imperial Ottoman Bank carried on business as bankers in Constantinople and in London, and their profits in the year 1875 were gained or accrued from business carried on in the United Kingdom and out of the United Kingdom.

It was held in *Attorney General* v. *Alexander* (1) that the Imperial Ottoman Bank was not liable to be assessed to income tax in respect of its whole profits as a "person residing within the United Kingdom," under the 1st clause of schedule D, but was liable in respect of the profits arising from its business carried on in the United Kingdom under the 2nd. The profits arising from its business carried on in the United Kingdom for the year ending the 5th of April, 1875, were ascertained under the provisions of the 5 & 6 Vict. c. 35, s. 100, first case of rules of the statute, upon an average of three years, to be 81,477*l.* 4*s.* 8*d.*, and on this amount the Imperial Ottoman Bank admit they are liable to be assessed to the income tax, but contend that they are not liable to be assessed to, or to pay more.

The annual profits of the Imperial Ottoman Bank arising from their whole business both in and out of the United Kingdom are after certain deductions divided equally amongst the shareholders, and the dividend is paid on coupons attached to the shares when presented for payment. In the year 1874–75 98,322*l.* 10*s.* was paid in London by the London branch of the Imperial Ottoman Bank as dividend on shares presented there. Each person receiving his dividend was liable to pay income tax thereon under the first clause of schedule D, and it was admitted in argument that in practice income tax was deducted on payment of the dividend by the London branch of the Imperial Ottoman Bank.

By the provisions of 5 & 6 Vict. c. 80, s. 2, and 16 & 17 Vict. c. 34, s. 10, all persons intrusted with the payment of dividends in respect of shares of any foreign country to any persons in Great

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Britain shall deliver to the commissioners for special purposes an account of the dividends and shares intrusted to them for payment, and the commissioners shall make an assessment thereon giving notice of the amount of such assessment to the persons intrusted who shall pay the duty, that is the income tax, on those shares on behalf of such persons in Great Britain, out of the moneys in their hands.

The Imperial Ottoman Bank in London were persons intrusted with the payment of the 98,322*l.* 10*s.*, the dividend on the shares presented in London, and as such persons so intrusted were entitled to deduct the income tax from the dividend holder, and therefore must pay and be assessed for the amount.

Each dividend paid represents a portion of profits arising in the United Kingdom and a portion of profits arising out of the United Kingdom. As they have already been assessed for that portion of the profits arising in the United Kingdom in the 81,477*l.* 4*s.* 8*d.* they have a right to retain so much of that income tax as would be applicable to that portion otherwise they would be charged twice over, but with reference to so much of the income tax as is applicable to the portion representing profits out of the United Kingdom they must pay that over to the commissioners under the provisions of the two last statutes referred to, and must be assessed for the same.

It was urged that the Imperial Ottoman Bank were only liable to pay upon the amount of their profits in the United Kingdom, and upon any sum remitted to them beyond those profits to enable them to pay dividends in the United Kingdom, but where the profits in the United Kingdom were less or equal to the dividend to be paid in the United Kingdom they were to pay nothing more.

I find no such word as "remitted" in any of the statutes. When they are intrusted with the amounts to pay the dividend, they are to pay, out of the moneys in their hands, that is out of the money intrusted to them, the amount of each dividend, less the income tax to the coupon holder in the United Kingdom and the amount of the income tax to the commissioners.

The amount of income tax to be paid is not to be regulated by any system of bookkeeping or practice the Imperial Ottoman Bank may adopt.

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It might be that the whole of the profits made in the United Kingdom were transmitted to Constantinople, and yet a sufficient amount arising on financial operations remained in the hands of the Imperial Ottoman Bank in London out of which they were intrusted to pay the coupon holders in the United Kingdom, or that there was sufficient in the Imperial Ottoman Bank in London to enable them to hold to the credit of the bank in Constantinople the whole of the profits made in the United Kingdom, and besides to pay the dividends on the coupons in the United Kingdom; or it might be at the particular period of a financial year when the dividend had to be paid that there was no balance in the hands of the London house, and the whole had to be remitted from Constantinople. Could it be said that in the first two cases the Imperial Ottoman Bank were not to pay over to the commissioners the amount of income tax they had deducted on paying the dividend, and in the last case they were?

It was said that it would be difficult to ascertain what proportion of the 98,322*l.* 10*s.* would represent profits made out of the United Kingdom, but if it cannot be ascertained absolutely it may be arrived at proximately by the process suggested in paragraph 37 of the case, or by some other method.

It follows that the assessments of the commissioners in paragraphs 35 and 37 of the case cannot be supported. The case must go back to them to make the assessment on the total amount of the profits made in the United Kingdom on an average of three years, that is 81,477*l.* 4*s.* 8*d.*, plus the amount of so much of the 98,322*l.* 10*s.*, as can be ascertained to be profits made out of the United Kingdom in 1874–75.

The principle of the first case rule 1 of 5 & 6 Vict. c. 35, s. 100, not being applicable, as neither party has established the position contended for, I think there should be no costs.

If the Imperial Ottoman Bank on demand refuse or neglect to furnish the necessary information to the commissioners to enable them to assess the amount of foreign made profits in the English paid dividends, it may be that the commissioners would be justified in assessing the Ottoman Bank to the full amount of the English paid dividend, leaving them to prove on what amount they have already paid income tax as profits earned in the United Kingdom.

POLLOCK, B. The question which arises in this case is, in respect of what funds coming to the hands of the London agency of the Imperial Ottoman Bank are they properly assessable to income tax?

The bank is a corporation established as a Societé Anonyme under a government concession at Constantinople, and having branches or agencies at Paris and London, business being carried on, and profits at times being made in all three places.

The capital of the bank is divided into shares of 20*l.* each. The certificates of shares are made out to bearer and the shares themselves are transferable by delivery of the certificate. The dividends thereon are payable at the option of the holders at Constantinople, Paris, or London by means of coupons attached to the certificate. At the end of each year the accounts are submitted to a general meeting, who fix the amount of the annual dividend. The nett proceeds, after deducting all expenses, constitute the profits, and out of these there is deducted 10 per cent. for reserve fund and 5 per cent. on the share capital for dividend on account. The surplus, after paying one-tenth to the founders and members of the committee and council is distributed as dividend to the shareholders.

The London agency act as agents for the bank in the United Kingdom, and pay to any coupon holders who may produce them at the London office the amounts to which from time to time they may be entitled by way of dividend.

The bank admit that they are liable to be assessed for income tax under 16 & 17 Vict. c. 34, s. 2, schedule D, in respect of all money coming to the hands of the London branch which arises from profits earned within the United Kingdom.

They also admit that whenever the amount earned by such profits is insufficient to pay the dividends payable in the United Kingdom, and money is transmitted from abroad to pay so much of the dividends as cannot be paid out of such profits, they are liable to be assessed in respect of such money by virtue of s. 10 of the above Act; and as to both of these income tax has, in previous years, been assessed and paid. The Income Tax Commissioners, however, make a further claim, and assert that although the amount paid by way of dividend in the United Kingdom should

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not in any one year exceed the amount of profit earned in the United Kingdom, the bank are liable to income tax in respect of so much of the amount paid in the United Kingdom by way of dividend as consists of profits earned abroad.

The mode in which the commissioners have sought to assess the London agency in respect of this sum is twofold.

By one assessment the commissioners treated all the shareholders as persons, some of whom reside in the United Kingdom and some elsewhere, carrying on a concern jointly in the United Kingdom and elsewhere; and as to those who reside in the United Kingdom the commissioners claim to tax them in respect of their share of the entire profits, whether earned in the United Kingdom or elsewhere.

By an alternative assessment the commissioners treated the London branch or agents as persons in the United Kingdom intrusted with dividends payable out of the funds of a foreign company, and as such liable to income tax in respect of all dividends in the United Kingdom, and also as persons liable to income tax in respect of all profits made in the United Kingdom, but, to the extent that the amount paid by way of dividend consisted of profits earned in the United Kingdom, the commissioners admitted that this amount, having been taxed once as profits, was not further liable. In the result, therefore, the commissioners by this assessment claim to tax, first, all profits made in the United Kingdom, and, secondly, so much of the amount paid for dividends in the United Kingdom as consists of profits earned elsewhere.

The first of these two assessments appears to me to be wrong in principle for these reasons. The bank is a foreign corporation whose chief place of business is at Constantinople and, as has already been decided by *Attorney General* v. *Alexander* (1), the London branch or agency cannot be treated as a person residing in the United Kingdom. The bank itself is a corporation, and although a foreign corporation its constitution as such should be respected and recognized by the legal tribunals of this country. It results from this that the shareholders, although they receive in the shape of dividends that which is derived from the profits of

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the bank, are not partners and cannot be treated as such. In other words their right under the constitution of the corporation is to a dividend, but they have beyond this no interest in the general funds of the bank.

With respect to the alternative assessment the English agents are in my opinion properly assessed, and for these reasons; according to the literal construction of the statute the profits which have been earned in the United Kingdom and are in the hands of the English agents to be distributed among the shareholders in the United Kingdom by the payment of dividends, come within the incidence of both branches of the statute. First, they are annual profits arising from a trade exercised within the United Kingdom within the second branch of schedule D, and are properly assessable as such under s. 100. Secondly, with respect to all money in the hands of the London agents applicable to the payment of dividend to the shareholders within the United Kingdom they are intrusted therewith for payment to persons in the United Kingdom within the meaning of s. 10, whether such money arises from profits earned in England or elsewhere; the language of the section being "intrusted to" not "transmitted to," and so the London agents are assessable under the provisions of s. 10, and unless there be good reason to the contrary they must pay income tax upon the whole amount.

If, however, they can shew that they have already paid income tax upon the amount in whole or in part, they are entitled to do so, inasmuch as it would be clearly unjust that they should pay twice over. Then arises the question which appears to me to give rise to the entire difficulty in this case. In respect of what portion have they paid twice over, or have they so paid in respect of the whole? Now it is quite clear that the dividends which are payable alike to all the shareholders whether resident within the United Kingdom or not may, and probably do accrue from profits earned within the United Kingdom and also from profits earned without the United Kingdom, and this is not in any way disturbed or affected by the fact that the directors choose to pay such dividends out of any particular moneys as moneys earned in Constantinople, Paris, or London. Hence the London agents, by paying tax upon the profits made in the United Kingdom are

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entitled to have the tax payable upon the dividends reduced only in respect of so much of those dividends as arose from profits earned in the United Kingdom.

If all the money applicable to dividends paid within the United Kingdom was in any year earned within the United Kingdom only, then the profits earned within the United Kingdom would represent in all respects the same sum, and the agents having paid upon it as profits, ought not to pay upon it again as money intrusted to them to pay dividends. If, however, a portion only was earned within the United Kingdom then they can claim to deduct in respect of that portion only; otherwise no income tax would be paid upon that portion of the money intrusted to the agents for payment of dividends which was earned abroad.

In the result the first assessment cannot be supported. The second is correct, but the bank by a proper return may escape its effect to the extent I have indicated.

Under these circumstances there should be no order as to costs.

KELLY, C.B. I am of opinion that the appellants are entitled to the judgment of the Court, on the ground that the assessment made and sought to be enforced by the Crown upon the bank is a claim at once to income tax on the year's profits of a body of traders, and then to income tax again upon their year's income, in which the fact is lost sight of by the Crown that the profits of a trader constitute his income, and are in fact his income, and that profits and income are one and the same thing, and that the assessment by the Crown upon the bank in this case is as if a banker, or merchant, or shopkeeper, who had earned 1000*l.* as profits in a given year by his trade, and which in fact constituted his whole and sole income and means of subsistence, were to be made to pay the income tax, first upon the 1000*l.*, the profits earned within the year, and then over again upon the same 1000*l.*, as his income when he should proceed to appropriate and expend it in the maintenance of his family; which, simply stated, would be to make a trader who made a 1000*l.* a year, and had no other income, to pay the income tax upon it twice over, and so in the year in question to pay fourpence in the pound instead of twopence for income tax.

This was attempted by the Crown for the first time in 1874–75, the true principle having been acted upon, alike by the Crown and the bank, from 1863 until the year 1874–75, of assessing to the income tax the profits earned in England, but once, and once only; and when the amount so earned was insufficient to meet the payment of the coupons, which constituted the dividends for the year in question, it was necessary to require a further sum to be intrusted to the agency from abroad, and application for it was made, and it was remitted from Constantinople accordingly, and so intrusted to the agency within the statute; and of this sum a return was made, and income tax paid upon it under s. 10 of the Act. No claim was made, as now, to tax the bank in respect of the act of payment of the coupons, nor (except in *Alexander's Case* (1), hereafter noticed), to tax any other sum than the amount of the earnings in England, and the amount intrusted, if any, and remitted from Constantinople, under the statute. The real facts of the case, when correctly stated and attentively considered, together with the legislative provisions alone applicable to the questions which are raised, will be found to demonstrate these propositions; especially when the case can be presented or illustrated in a form divested of intricate arithmetical calculations, and unmanageable figures.

But, first, as to the facts as they appear in the printed case. The Ottoman Bank is a large body of shareholders (whether corporate or incorporate is immaterial), carrying on its business at Constantinople, in Paris, and in London. One portion of its shareholders reside in Turkey, another in France, and another in England. The accounts of the bank are taken at the end of December in each year, and the amount of dividends to be paid in the shape of coupons is ascertained by the 5th of April in the following year, and the assessment to the income tax in relation to the year in question, 1874–75, is made when these figures are ascertained, after the 5th of April, in the year 1875. The accounts of the bank having been taken at the end of December in each year, and the profits made in each of the three countries being ascertained, a dividend is declared, which, after certain deductions, is paid to the shareholders in the three

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countries upon the presentation of coupons, which coupons are annexed to the shares, and are therefore in the hands of the shareholders. No payment of money actually takes place, except upon the presentation of the coupons, but the amount of the dividend declared is published in the three countries; and this amount determines the value of each coupon. The coupons, which are payable half-yearly, that is, two coupons for each year, are annexed to each share, and they are made payable at the offices of the bank in the three cities of Constantinople, Paris, and London.

In the year in question, 1874–75, the amount of profits actually earned in England was 145,539*l.* 0*s.* 2*d.* The sum under the regulations and practice of the commissioners, in respect of which the bank was assessed, and being the average of the profits earned during the next preceding three years, was 81,477*l.* 14*s.* 8*d.* The amount paid upon the presentation of coupons, and treated as paid for dividends, to which English shareholders were entitled, was 98,322*l.* 10*s.* These sums were returned to the commissioners by the bank or their representatives here, and were, in my opinion, all that they were called upon to return as material to the case, or that in fact it was possible for them to return. The bank have, however, at my instance, through their solicitors, furnished certain further information (1) which has also been laid before the commissioners, and is strictly correct; and we now know that the entire aggregate of profits made in the three countries during the year in question was 848,125*l.* 12*s.* 7*d.* It follows, therefore, that the sum already specified, having been earned in England, that 702,586*l.* 12*s.* 5*d.* was earned abroad; that is, at Constantinople and in Paris together.

The provisions of the Acts of Parliament applicable to the case are, first, the second clause in Schedule D. of the 16 & 17 Vict. c. 34, s. 2, which imposes the income tax upon the annual profits or gains arising or accruing to any person (or corporate body) although not resident in the United Kingdom, from any trade exercised within the United Kingdom. Under this provision the bank have been assessed upon the sum of 81,477*l.* 14*s.* 8*d.*, which the commissioners themselves have substituted, as the

(1) Containing an account of the actual profits and dividends for several years.

average of the next preceding three years for the sum actually earned of 145,539*l.* 0*s.* 2*d.*, and this assessment has been acquiesced in and paid by the bank to the Crown. And as the sum of 98,322*l.* 10*s.* was the amount paid to the holders of coupons, upon their presentation, that sum has been also returned; and inasmuch as the amount of profits earned in England, and in the hands of the bank here, was sufficient to meet and to pay this sum, no further sum has been required to be supplied or was supplied from Constantinople, and so "intrusted" to the bank here under the 16 & 17 Vict. c. 34, s. 10; and I am of opinion, therefore, that the liability of the bank to income tax is at an end.

Some complexity is occasioned by its appearing that 98,322*l.* 10*s.* has been provided for by the smaller sum of 81,477*l.* 14*s.* 8*d.*; but, as this arises from the mode of assessment of the profits adopted by the commissioners themselves, I am not aware that any question was raised on this point during the argument. Reference has been made to s. 100 of 5 & 6 Vict. c. 35; but it must be remembered throughout this case, that this is not an assessment of the shareholders resident in England upon the amount of their respective incomes as shareholders in the bank, but is an assessment upon the bank itself, in respect of the specific sum of 81,477*l.* 14*s.* 8*d.*, assumed by the Crown to be the amount of the profits earned in England; and upon what ground that amount of profits, having been assessed to and paid the income tax, a new and additional assessment can be made upon the 98,322*l.* 10*s.*, to the payment of which the profits of the year have been applied, I am at a loss to understand; this, as already observed, being an assessment to the income tax, not upon profits, nor upon the income derived from the profits, but upon the mere act of payment of the income to those who are entitled to it.

Then it is said that this money, 81,477*l.* 14*s.* 8*d.*, is money "intrusted" to the bank, under the 16 & 17 Vict. c. 34, s. 10; but, in the first place, it must be remembered that the amount of profits earned in England is not, in fact, a large specific sum, which might consist of bank notes, or of gold lying upon a table, but is the result of almost innumerable operations, by which very small, as well as large, sums are realised as profits during an entire year,

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from 1*l.* to 1000*l.* and upwards, realised day by day and hour by hour in the bank. And if it could be said that each and every of these sums is money "intrusted" to the bank under the Act referred to, the same might be said of every sum of any and every amount which comes into the hands of the bank in the course of the year, and which sums, great and small, are applied to all imaginable purposes, such as the payment of clerks and servants, the payment of the rent of offices, the insurance of their property, and all other purposes incidental to the business of a bank. How can a sum of 50*l.*, which has come into the hands of the bank in London in the ordinary course of their dealings, and which is applied in the payment to one of their clerks of half a year's salary, which is as much "intrusted" to the bank as the sums daily arising to them from profits upon their transactions, be seriously argued to be money "intrusted" to them under and according to the provisions of this s. 10 of the Act of Parliament? I know of no other form in which the proposition contended for on the part of the Crown can be stated than to insist that upon a true construction of the Act of Parliament the sum earned as profits within the year, and applied to the payment of dividends, is impressed with a double character, and may be assessed to the income tax, first, as profits earned in England, and next, as money intrusted to the bank under the statute. I can only repeat that in my view of the case, if this be so, every shilling that they receive in England, and at whatever time, and for whatever purpose, or to whatever purposes it may be applied, is "intrusted" to the agency in London by the bank itself, and within the meaning of the statute. The Attorney General, in his ingenious argument, suggested, and indeed contended, that the profits received by a shareholder, and constituting the whole or a part of his income, are liable to assessment, whether such profits were earned in England or abroad. And it is certainly, in one sense, true, not that any Act of Parliament makes the profits earned by this bank abroad liable to assessment to the income tax, the contrary having been decided by this Court in the case of *Attorney General* v. *Alexander* (1), so often referred to, but there can be no doubt that every dividend upon every share in the

(1) Law Rep. 10 Ex. 20.

bank to which the shareholder is entitled consists of profits earned abroad, as well as profits earned in England, and if this were an assessment upon a shareholder, upon his income derived from his shares in the bank, he would no doubt be liable to the assessment, and in that sense would be liable to the tax, as well upon the profits earned abroad as upon the profits earned in England, of which his dividend should be composed. But the Government of this country has thought fit, by means of legislation, convenient and advantageous to itself, to abstain from taxation in respect of the income tax of shareholders in a foreign bank resident in this country by a direct assessment made upon the shareholders themselves, and has substituted a liability to the income tax upon any agents or representatives of a foreign bank here who are "intrusted," under the provisions of s. 10, so often referred to, with the money of the bank, for the purpose of paying the dividends, in respect of which shareholders resident in England would themselves have been liable to assessment. We have, therefore, to consider whether, where the amount of profits earned by a foreign bank in England within a year has been assessed to, and has paid, the income tax; and that same sum of money has been found sufficient to pay the dividends, or the coupons, supposed to represent the dividends, to which English shareholders are entitled, that same sum of money is liable to be assessed and to pay the income tax over again, upon its application to the payment of the coupons assumed to represent the dividends of the English shareholders, on the ground that it is "intrusted" to the agency here under the statute, the 16 & 17 Vict. c. 34. For this there is no warrant in any of the statutes. As profits earned in England, the amount has already been assessed and the income tax paid to the Crown, and no money whatever has been "intrusted" to the agency under the statute, 16 & 17 Vict. c. 34, s. 10.

The two provisions applicable to this case, and under which alone the bank can be assessed to the income tax, are, first, the clauses in schedule D, to which reference has already been made, and then, where it is brought into operation, the 16 & 17 Vict. c. 34, s. 10. The effect of that statute which is most useful and beneficial to the government here, is simply this, that where, in

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order to satisfy the claims to an income consisting of dividends upon the shares or stock of a foreign corporation, it is necessary to remit money to England, then that, instead of remittances by the corporation abroad to the shareholders in this country and an assessment to the income tax upon such shareholders, the foreign corporation may remit the aggregate amount of the dividends to which such shareholders would be entitled to an agency or a branch bank in this country, and assess them to the amount so remitted, leaving it to them to pay the English shareholders, deducting the amount of the income tax which shall have been paid by the branch bank, or agents, to the Crown; and this is called an intrusting by the bank to the agency of the amount so remitted. And in every year from the year 1863, when the bank was established, to 1874–75, the amount of profits earned in England has been found insufficient to pay the amount of dividends which had already, before the 5th of April, been paid by the agency to the English shareholders upon the presentation of their coupons, the amount deficient has been required from the bank abroad, and has been remitted from Constantinople, and so intrusted to the agency within the statute, and the income tax has been paid upon it by the branch bank or agency here, in strict accordance with the provisions of this Act. Both statutes have therefore been complied with from 1863 to the year in question, 1874–75; the provisions of the Act in schedule D, and the provisions of 16 & 17 Vict. c. 34, s. 10, in respect of the amount required and remitted from abroad. In the year in question, 1874–75, the sum earned as profits by the bank in England, being 145,539*l.* 0*s.* 2*d.* (for which the commissioners have substituted 81,477*l.* 14*s.* 8*d.*), and that sum being actually in hand and, more than sufficient to pay the 98,322*l.* 10*s.*, the dividends due to and claimed by the English shareholders upon their coupons, no money whatsoever has been required to be remitted or has been remitted from abroad; and so there is no other sum in existence, upon the facts of the case, upon which the bank could have been or can be, assessed to the income tax, and I in vain called upon the learned counsel for the commissioners to point out what enactment, in any Act of Parliament, authorized or empowered the commissioners to assess the Ottoman Bank, upon any other

than these specified sums in respect of which they have been assessed and have paid the tax.

In like manner, I called upon the learned counsel for the commissioners, to point out and specify what returns the bank could be called upon to make which they have not made, and which it was possible for them to make. They have returned the amount of profits earned in England and the amount which they have been called upon to pay and have paid upon the presentation of the coupons, representing or assumed to represent, the dividends of the English shareholders. They have indeed added the amount earned by the bank at Constantinople, and in Paris, though I do not see what bearing that amount has upon any question in this appeal. It is clear upon these facts that the Ottoman Bank has been assessed to and has paid the income tax upon the whole of that portion of its profits which has been earned in England: and, as decided in this Court in the case of *Attorney General* v. *Alexander* (1) the bank is not liable to assessment upon any portion of the profits earned abroad. It has therefore, satisfied the provisions of the Act in schedule D, and in the year in question, unlike what was found to be necessary in former years, the London agency have not needed the aid of the establishment at Constantinople or in Paris to meet the dividends which they have been called upon to pay, and have paid to the English shareholders, and so have not brought the 16 & 17 Vict. c. 34, s. 10, into operation at all.

In order to avoid the intricate calculations which have been resorted to by the learned counsel for the commissioners, and the large figures so inconvenient to deal with, which appear in the real statement of the case, I would suggest a more convenient form in which every question in the case may be dealt with. Suppose the bank to have made in the year in question, in the three countries, a profit of 500,000*l.*; 100,000*l.* in England and 400,000*l.* abroad, of which 200,000*l.* have been made in Constantinople, and 200,000*l.* in Paris. Suppose the English shareholders be entitled altogether to dividends, to be paid to them upon the presentation of coupons, to amount to 100,000*l.*; the Paris shareholders, in like manner, to 200,000*l.*; and the Constantinople

(1) Law Rep. 10 Ex. 20.

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shareholders to the remaining 200,000*l.* The bank has, therefore, 500,000*l.* of profits in its hands; of which 100,000*l.*, which has been earned in England, is in the hands of the agency in England, and the remaining 200,000*l* and 200,000*l.* at Constantinople and in Paris respectively. In respect of what sum or sums of money is the bank liable, under the two statutes referred to, to be assessed to the income tax? 100,000*l.* having been earned in England they are to be assessed to the income tax upon that sum. Upon the 400,000*l.* earned abroad they are liable to no assessment whatsoever. If with the 100,000*l.* in their hands in England they pay to the English shareholders the dividends or coupons to the amount of the 100,000*l.* to which the shareholders are entitled, deducting the income tax, and they pay to the shareholders at Paris the 200,000*l.* and the shareholders at Constantinople the remaining 200,000*l.*, without deduction, they have thus disposed of the whole of the 500,000*l.*, the entire aggregate of their year's profits; and by virtue of what provision in any Act of Parliament can the bank be assessed in respect of any other sum whatever? The case may be put in every variety of form, and upon every variety of possible facts that can be supposed; and the result will be found, that, unless a trader, or a body of traders, like the Ottoman Bank, can be made to pay income tax first upon the profits of their trade, and afterwards upon the incomes of their shareholders, which incomes are derived from their profits, and are, in fact, their profits upon the division of such profits among those who are entitled to them, and which shares of the aggregate profits to which they are entitled, constitute, and are in fact, their incomes, no assessment can be made under any imaginable state of things that can be suggested, beyond a single assessment upon the profits which the trader has earned.

Suppose from some political disturbance in Turkey and France, or from any other cause, the whole profits of 500,000*l.* to have been earned in England, and the whole of the shareholders in the bank to have quitted the Continent and to be resident in England; the bank is assessed upon the amount of profits, and pays the income tax of 2*d.* in the pound upon 500,000*l.* The sum is then divided among the shareholders, and constitutes their incomes, and if, as I hold to be the law, profits and income con-

sisting of those profits, are one and the same thing, the trader can be taxed but once upon the sum thus earned, being his year's income.

But, before proceeding further, to put the question in the clearest and simplest form, suppose a firm of bankers, consisting of two partners, had earned profits in their business to the amount of 10,000*l.* within the year, which profits in their business were their only incomes or sources of subsistence, and they return as the amount of their year's profits or incomes this sum of 10,000*l.*, and are assessed to the income tax upon that amount, and pay the tax accordingly. They then proceed to divide the money, each partner taking 5000*l.* of it, and expend it in the course of the year upon the maintenance of himself and his family. Could these two individuals be assessed over again, each to the sum of 5000*l.*, upon their having divided it between them, and proceeding to appropriate and expend it? For if so, if the income tax were, as in 1875, 2*d.* in the pound, they would have to pay to the Crown, not 2*d.*, but 4*d.* in the pound upon their income; and this additional tax would in reality be imposed, not upon the year's income derived from the profits of a trade, but upon the mere act of receiving and appropriating such profits, quod absurdum est.

Suppose, next, the case first put, and which, except as to the amounts of the figures, is identical with the case now before the Court, of the bank possessing 500,000*l.* which has been earned for profits; of which 100,000*l.* having been earned in England, is in England, and the shareholders in England being entitled to 100,000*l.* in respect of dividends or coupons, the 100,000*l.* in their hands, and on the spot, is paid to the English shareholders; and the 200,000*l.* in Paris, to the shareholders in Paris; and the remaining 200,000*l.* to the Turkish shareholders in Constantinople. Can it be contended that the bank is liable to pay the income tax upon either of these two latter sums of 200,000*l.*?

In such a case the Ottoman Bank would have in its hands 500,000*l.*, the aggregate amount of its profits in the three countries within the year. Of this, 100,000*l.* having been earned in England, would be here, in London; and 200,000*l.* having been earned in Paris, would be in Paris; and the remaining 200,000*l.*,

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having been earned in Turkey, would be at Constantinople. The bank would accordingly pay the 100,000*l.*, which they have here, to the English shareholders who are here; the 200,000*l.* which they have at Paris they would pay to the shareholders in Paris; and the 200,000*l.* which they have at Constantinople would be paid to the Turkish shareholders at Constantinople. Is it possible seriously to contend that any law or statute in England would compel the bank to divide 100,000*l.*, which they have here, into five parts, and remit two fifth parts to Paris, and two fifth parts to Constantinople; and also to divide the 200,000*l.* which they have in Paris into five parts, and remit one fifth part to England and two fifth parts to Constantinople; and again to divide the 200,000*l.* at Constantinople into five parts, and remit one fifth part to London, and two fifth parts to Paris; and retain the remaining two fifth parts at Constantinople; instead of paying the 100,000*l.* which they have in England to the shareholders there, and the 200,000*l.* which they have in Paris, and the 200,000*l.* at Constantinople, to their shareholders in those two cities respectively? Yet this is the course which they would be bound to adopt, if the calculation and application of those different sums, suggested in the arguments for the Crown, were to be practically adopted.

As to the claim to have certain other returns made; as we have already before us the several sums before referred to, which are all that are known, or can be known to the Ottoman Bank or its agents in England, or elsewhere, there remains but the number of shareholders, and the precise amount of the dividends to which they are entitled, that can be suggested on the part of the Crown. As to the shareholders, I have already pointed out that the number is unknown, and unascertainable. No register is kept, and their number, the shares being transferable by delivery from hand to hand, may, as already observed, vary from day to day, and hour to hour. And as to the amount of dividends to which the English shareholders, or any others, may be entitled, inasmuch as the coupons are also transferable by delivery and may pass from hand to hand at any moment, and in either of the three countries, it is only upon their being presented and paid that the bank or their agents can know or ascertain their amount as presented in

each of the three cities; and even then they know not to whom they belong. The practice adopted by the bank, and indeed forced upon them by the commissioners, is to take the amount of the coupons, paid by the agency in England, to be the amount of the dividends to which the English shareholders are entitled; but it is obvious that as many of these coupons may have been brought or remitted to England by foreign shareholders to whom they belonged, a considerable sum may have been paid, within any given year, to persons not English shareholders, and who, therefore, are not liable to income tax.

The ingenious suggestion and calculation of the Attorney General, to the effect that the English shareholders are liable to pay the tax upon profits made abroad, as constituting a portion of their dividends, really comes to this:—Every single dividend upon every share is really composed of profits earned in the three countries. If the English shareholders were assessed on their respective incomes here, no doubt they would be liable to the income tax wherever the different portions of the amounts had been earned. But the assessment here is on the bank; and the bank is liable only to the income tax upon the profits earned in England, and upon the money remitted to them from abroad for the payment of their dividends to the English shareholders under the 16 & 17 Vict. c. 34, s. 10; and to no other assessment whatsoever.

By adopting the convenient figures which I have suggested, of 500,000*l.* of profits, every possible case which can occur may be tested upon the true principles of assessment; whether, by supposing the whole of the profits earned in England, and the whole of the shareholders to be resident in England; or the whole of the profits made abroad, and the whole of the shareholders resident abroad; or a portion of the profits earned in England, and the remaining portions abroad. And, in each and every case, by the application of the English statutes, the extent and the amount of the assessments to income tax upon a bank may be ascertained.

But, finally, to take the real sums appearing upon the case (however inconvenient may be the figures to be dealt with), the sum earned in England in the year in question is 145,539*l.* 0*s.* 2*d.* But for this must be substituted, as required by the commissioners,

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upon the three years' average principle, 81,477*l.* 14*s.* 8*d.* Upon this the income tax of 2*d.* in the pound is 678*l.* 19*s.* 7*d.*; and this sum has been assessed upon the appellants, and paid by them to the Crown. The sum paid to the English shareholders, or such as are assumed to be English shareholders, upon the coupons presented to the bank in the year in question, is 98,322*l.* 10*s.* But this sum has been paid out of the profits actually earned in England, and upon which the income tax has been assessed and paid, though claimed by the commissioners upon the minor amount only of 81,477*l.* 14*s.* 4*d.* Unless, therefore, contrary to the practice adopted and acted upon from the year 1863 until the year in question, 1874–75, the Crown is now entitled to claim income tax, at once, upon profits earned, and upon the income consisting of such profits; in other words, unless traders in England, are liable to the income tax upon the profits which they earned within the year, and again, upon the income which, in fact, is the profits thus earned, the trader possessing no other income, it is impossible, for the reason assigned, for the Crown to maintain its claim to income tax upon the 145,539*l.* 0*s.* 2*d.*, or, as substituted for it by the commissioners, upon 81,477*l.* 14*s.* 8*d.*, and also upon the sum of 98,322*l.* 10*s.*, which constitutes the incomes of the whole body of English shareholders, and which is paid to them as representing their shares of the whole profits of the bank, or the proportion to which they are entitled of the sum of 848,125*l.* 12*s.* 7*d.* Of this sum, which constituted the aggregate profits made by the bank in the three countries within the year in question, the bank, by its representatives of this country, having here upon the spot a sum sufficient to pay this amount to the shareholders, have paid it accordingly. Unless the fanciful, and I venture to think the absurd course were adopted, of remitting to Paris and Constantinople the proportions of this sum of 145,539*l.* 0*s.* 2*d.*, to which the foreign shareholders were entitled, and then requiring the bank abroad to remit back again to them the proportion of profits made abroad, which in that case would belong to the English shareholders, the case in fact is simply this, that out of the aggregate profits earned by the bank they have paid to the shareholders, as represented by the appellants, that portion of the aggregate profits which the bank had

in its possession here in England in satisfaction of the dividends claimed by the English shareholders, and to the foreign shareholders the proportion of the entire profits to which they were entitled. I quite agree that it is not competent to the Ottoman Bank by any mode in which they may think fit to carry on their business to defeat or to evade the claim to any income tax to which the Crown is entitled. But the British Government having thought fit to relieve itself from the inconvenient task of assessing an indefinite number of English shareholders, whose numbers are unknown, and whose residence may be likewise unknown, to the income tax, to which they are liable upon their respective incomes, is itself bound, as well as the Ottoman Bank, to resort to the Act of Parliament which the government itself has framed and passed, for assessing the bank in lieu of the shareholders under the provisions of that Act to whatever amount of money may have been intrusted to them, within and according to those provisions for the purpose of paying those incomes to the shareholders. And, as already observed, there are now no other provisions of any Act or Acts of Parliament in existence under which the Ottomon Bank can be lawfully assessed to the income tax than the 2nd clause in schedule D, and the 10th section of 16 & 17 Vict. c. 34. And although it is true that there is no such word in the latter statute as "remitted," it is perfectly clear that the agency of the bank in England can obtain the sum of money in respect of which they are to be assessed instead of the shareholders in no other way than according to the precise terms to be found in the statute, and which is a remittance from abroad of the sum required when the amount of profits earned in England, and already in their hands, is insufficient for that purpose. Were it otherwise, and if the bank could be assessed in respect of any other sum than that which is intrusted to them from abroad by virtue of that statute, it could only be for the 98,322*l.* 10*s.*, which will have been paid to those assumed to be the English shareholders: and as that sum is income, and income only, and the profits with which it has been paid are profits earned in England, and the only profits in the hands of the Ottoman Bank liable to income tax, unless profits and income, which consists of profits, can be taxed twice over, which, for the reasons assigned, I

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hold that they cannot, the Ottoman Bank is not liable to this double taxation. As to the demand of 115,835*l.*, and then of 197,412*l.* 14*s.* 8*d.*, I must leave it to the advisers of the Crown, with the assistance of the judgments of my learned brethren, as they best can, to specify the amounts of these sums, and how they are made up, and the grounds upon which by any law or statute of England they are made liable to the income tax.

Finally, I am of opinion that the judgment in this case should be entered, mutatis mutandis, for the appellant, in the terms of the judgment entered in the case of *Attorney General* v. *Alexander* (1) as follows:—

"That the London agency of the Imperial Ottoman Bank (such agency being represented by the appellant), is only bound to make a return under the 5 & 6 Vict. c. 35, in respect of the profits made in the United Kingdom; and, inasmuch as no profits made abroad have been actually remitted to this country for distribution in London under 16 & 17 Vict. c. 34, s. 10, no further returns are required to be made, and the appellant is liable to no further or other assessment to the income tax, and that judgment be thereupon entered for the appellant, with costs of suit."

Case remitted. (2)

Solicitor for appellant: *G. M. Clements.*

Solicitor for respondent: *Solicitor of Inland Revenue.*

(1) Law Rep. 10 Ex. 20.

(2) The order drawn up, after reciting that a case had been stated and argued, continued:—"The Court are of opinion that the decision of the commissioners for special purposes of the income tax on confirming the assessment on dividends made upon the committee of the Imperial Ottoman Bank for the year 1874, ending the 5th of April, 1875, is based upon the right principle of assessing, in so far as it assesses so much of the profits of the bank intrusted to the committee for payment of dividends in the United Kingdom as is not shewn by a proper return on the part of the bank to arise from profits made in the United Kingdom, and do order the case to be remitted to the commissioners to be dealt with by them on the above stated principle, and do further order that no costs be paid on either side."

DIX *v.* GROOM AND ANOTHER. 1880 *Feb.* 18.

Practice—Action on Replevin Bond—Judgment for want of Statement of Defence—Order XXIX., rules 2, 4.

If, in an action on a replevin bond, the plaintiff, instead of claiming damages, claims the amount for which the bond is given, and becomes entitled to judgment by default, his proper course is to enter final judgment under Order XXIX., rule 2, and not interlocutory judgment under rule 4 of that order.

MOTION on appeal against an order of a judge at chambers refusing to set aside the judgment signed by the plaintiff.

The writ of summons was indorsed, "The plaintiff's claim is 102*l.* 8*s.* upon a bond to secure payment of 150*l.* and interest." The statement of claim alleged that the plaintiff had distrained certain goods and chattels in the Red Lion Inn, Hanley, and that one Sarah Mansfield claimed them, and that thereupon the defendants, by their bond, became bound to the plaintiff in the sum of 150*l.*, subject to the condition that the bond should be void if Sarah Mansfield prosecuted an action without delay and with effect against the plaintiff for taking the goods; that Sarah Mansfield did not prosecute the action of replevin with effect and without delay, and that the defendants had not performed the condition of their bond, and that the plaintiff had been delayed and hindered and defeated in obtaining payment of the sum for which the distress was levied, and had incurred costs and damages, and was entitled to recover the sum secured by the bond. The plaintiff claimed 150*l.*

The defendants appeared, but put in no statement of defence, whereupon the plaintiff signed interlocutory judgment and obtained an order from the district registrar of Hanley (where the action was commenced) that a writ of inquiry should issue to the sheriff of Staffordshire to assess the damages. The defendants took out a summons before the district registrar to set aside this judgment for irregularity, on the ground that the action was brought to recover a debt or liquidated demand, and that the judgment should have been final under Order XXIX., rule 2. The district registrar dismissed this summons, and on appeal his decision was affirmed by a judge at chambers.

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C. Dodd, for the defendants. Before the Judicature Acts it was not the practice to have a writ of inquiry on bail or replevin bonds, but to enter final judgment. The stat. 8 & 9 Wm. 3, c. 11, did not apply, because the courts of law could afford relief: *Middleton* v. *Bryan*. (1) The Judicature Acts and orders have not altered this, and the action is still for a debt or liquidated demand, and therefore within Order XXIX., rule 2. The defendants are obliged to apply to set aside the judgment, as otherwise they would become liable for the costs of the writ of inquiry.

A. E. Hardy, for the plaintiff. Under 11 Geo. 2, c. 19, s. 23, the value of the goods was ascertained, and the bond was in double such value, but under 19 & 20 Vict. c. 108, s. 65, this is not the case. There is then a substantial difference, for before the latter statute the claim being ascertained could be treated as a liquidated demand. At any rate, the former practice is superseded by Order XXIX., rules 2 and 4, and the amount to which the plaintiff is entitled must be ascertained by a writ of inquiry.

C. Dodd was not heard in reply.

LUSH, J. I am of opinion that the application by the defendants ought to succeed, on the ground that the writ of inquiry was not necessary or authorized. Before the passing of the Judicature Acts it is clear that there would have been no writ of inquiry. If the plaintiff claimed the whole amount of the bond, the proper course for the defendant was to apply to the Court for a stay of proceedings on payment of the amount really due and costs, and if there was any dispute as to what that amount was, it would be referred to a master to ascertain. I think this is not altered by the Judicature Acts and Orders. The plaintiff has the option of claiming the specific amount of the bond or damages. If he takes the former course, that is a demand of a liquidated amount, if the latter, then he must proceed under Order XXIX., rule 4. The forms given in Appendix D. to the Judicature Act, 1875, of judgments in default of appearance and defence, mark the difference between the case of a liquidated demand where the judgment is final, and the case where final judgment is entered only after

(1) 3 M. & S. 155.

assessment of damages. The former was the case here, and the plaintiff was entitled to sign final judgment, which he is at liberty to do now, but the interlocutory judgment and all subsequent proceedings must be set aside. The defendants are entitled to the costs of all the applications they have made.

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POLLOCK, B., concurred.

Solicitors for plaintiff: *Gregory, Rowcliffe, & Co., for J. L. Hamshaw, Hanley.*

Solicitors for defendants: *Pitman & Lane, for E. A. Ashmall, Hanley.*

[IN THE COURT OF APPEAL.]

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JONES, APPELLANT; THE CWMORTHEN SLATE COMPANY, LIMITED, RESPONDENTS.

Revenue—Income Tax—Slate Quarry, Assessment of—5 & 6 *Vict. c.* 35, *s.* 60, *Sched. A, No.* 3.

Slate was obtained from the side of a hill by underground workings carried on through levels:—

Held, affirming the judgment of the Exchequer Division, that the works were to be assessed as a quarry under rule 1 of No. 3 of Sched. A of 5 & 6 Vict. c. 35, s. 60, and not as a mine under rule 2 of that enactment.

APPEAL from the judgment of the Exchequer Division in favour of the appellant on a case stated by Commissioners of Income Tax pursuant to 37 & 38 Vict. c. 16, pt. 3.

The respondents were possessed of certain works for getting slate. The works were originally open, but for some years the slate had been got out by driving levels into the side of a hill, and the workings were carried on entirely underground. The respondents were assessed as the owners of a quarry, but the commissioners decided that the workings were a mine. Their decision was overruled in the Exchequer Division. (1)

1879. Dec. 18. *A. L. Smith*, for the respondents. The mode of getting the slate makes these works a mine, for it is carried on underground. The term quarry is properly applied to open workings, and the words of the statute must be read in their

(1) 4 Ex. D. 97.

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JONES v. CWMORTHEN SLATE COMPANY.

ordinary signification. Rule 1 of No. 3 of 5 & 6 Vict. c. 35, s. 60, Sched. A, refers to quarries, and rule 2 to mines. As the workings are in popular language mines, they ought to be assessed under the latter enactment. Turner, L.J., in *Bell* v. *Wilson* (1), defines the meaning of the word "quarry," and his definition does not apply here.

Sir H. Giffard, S.G., and *A. V. Dicey*, for the appellant. The question is not what the words "quarry" or "mine" mean in their popular sense, or what they mean in a conveyance, as in *Bell* v. *Wilson* (2), but what is the meaning of these words in this statute. The words of rule 2 are, "mines of coal, tin, lead, copper, mundic, iron, and other mines," but the words "other mines" must be construed ejusdem generis with the preceeding words. They cannot include alum mines, which are subsequently mentioned in rule 3. By rule 1, slate is classed with stone and limestone and chalk. These are all worked in quarries, and slate, which is not metallic, ought always to be assessed according to its nature, that is in the same manner as these substances.

A. L. Smith, in reply. When slate is worked from an open cutting, the owners ought to be assessed as for a quarry, but when the workings are carried on underground and cease to be a pit, they must be assessed as a mine. It is a question of fact whether the workings are a quarry or a mine, *Rex* v. *Sedgley* (3), and the facts stated in the present case clearly shew that the respondents are working a mine.

1879. Dec. 19. BRAMWELL, L.J. I am of opinion that the judgment should be affirmed. It seems to me that this is a clear case. We have not to consider what is the meaning of the words in the abstract, but what it is in the statute. Upon its true construction, I think that rule 2 must be confined to the mines therein mentioned, and to mines ejusdem generis. It cannot extend to all mines, because alum mines are expressly provided for in rule 3. The workings of the respondents are not ejusdem generis with the mines mentioned in rule 2. If the argument for the respondents that the workings are not a quarry is right, no assessment could be made upon them: the mode of working may

(1) Law Rep. 1 Ch. at p. 309. (2) Law Rep. 1 Ch. 303.
(3) 2 B. &. Ad. 65.

be similar to that of a mine, but it does not follow from that that the workings are a mine. It is somewhat difficult to define what a quarry is, but I think that the word generally means a place where the material is got out in a large shape like blocks, and not where it is got in small pieces like coal and ironstone. The judgment is right, and ought to be affirmed.

BRETT, L.J. I also am of opinion that the judgment ought to be affirmed. In one point of view the workings might almost be called a mine, and the slate seems to be obtained by mining operations; nevertheless the works come within the first rule and not within the second. The statute imposes the tax upon what is worked and not on the mode of working. The only use of classifying the subject-matter of the tax is to ascertain the liability of those who are to pay; those who obtain one kind of produce are liable to one rate, and those who obtain a different kind must be assessed differently. It is a mode of assessment for the benefit of the producer. It is a tax on the profits arising upon sale. In one class of produce the profits are tolerably uniform; in the other they are very varying. I think that the words "quarry" and "mine" are not used to describe the mode of working, and if that is correct, the respondents' workings cannot be a mine within the meaning of the statute. Upon the words before us I have no doubt that the judgment of the Exchequer Division was right.

COTTON, L.J. We have not to decide whether the respondents' workings are a quarry or a mine, but upon what principle they are to be assessed. It is true that there are two modes of working; the one underground, by which coal, copper, and iron are obtained, and the other upon the surface, by which stone and chalk are got; but the distinction is not between the modes of working but between the materials raised, and I think it was intended to include even underground workings for slate in the first rule.

Judgment affirmed.

Solicitors for respondents: *Gregory, Rowcliffes, & Rawle, for Jones & Jones, Portmadoc.*

Solicitor for appellant: *Solicitor of Inland Revenue.*

1880
March 1.

THE LONDON AND SOUTH WESTERN BANK, LIMITED, *v.* WENTWORTH.

Bill of Exchange — Acceptance in Blank — Evidence inadmissible to shew Drawing or Indorsement a Forgery.

Staff Cas 762

When a bill is accepted in blank for the purpose of being negotiated, and is afterwards filled in with the name and signature of a person as drawer and indorser, the acceptor cannot, as against a bonâ fide indorsee for value, adduce evidence to shew that either the drawing or indorsement is a forgery.

THE action was tried before Pollock, B., and a jury in May, 1879. The facts and the arguments on behalf of the plaintiffs sufficiently appear from the judgment.

An order nisi having been obtained for a new trial, on the ground of misdirection in rejecting evidence of the drawing or indorsement of the bill being forgeries, and of the identification of one Head, a witness, with the person purporting to be the payee and also the person as from whom Villars (the person through whom the plaintiffs claimed) took the bill and in directing the jury on the evidence,

1879. Nov. 13. *D. Seymour, Q.C.*, and *Castle*, for the plaintiffs, shewed cause, and were stopped by the Court.

Gaskell (*R. Vaughan Williams*, with him), for the defendant. It is admitted that one who accepts in blank gives authority to write a fictitious name as drawer; but he gives no authority to give the bill currency in the name of a real person as drawer for a fraudulent purpose, nor to forge the signature of a real person either as drawer or indorser. The tendered witness Head might have proved that the signatures of the drawing or indorsement were imitations of his writing and forgeries, or he might have shewn that the drawing was genuine and the indorsement a forgery. In either case the plaintiffs could not recover; a forged indorsement gives no title even to a bonâ fide holder. Some one may have picked up the bill in the street and forged the indorsement. If the ruling at the trial was right, any one accepting in blank gives authority to draw in the name of Rothschilds or any other well-known names of good credit, and to give the bill currency by

forging their signatures as drawers and indorsers. No decisions have countenanced such a contention, and it is contrary to the principle of *Hogarth* v. *Latham* (1) and *Baxendale* v. *Bennett*. (2)

Cur. adv. vult.

1880. March 1. The judgment of the Court (Pollock, B., and Hawkins, J.) was delivered by

POLLOCK, B. The plaintiffs sued as indorsees of a bill of exchange for 500*l.*, alleged to be drawn by "S. H. Head" upon the defendant, accepted by him, and indorsed by "S. H. Head" to the plaintiffs. At the trial the plaintiffs proved by their manager that the bill had been brought to them by one Villars, who was senior partner of a well-known firm of upholsterers who had an account with the plaintiffs, and who had on former occasions brought to them trade bills to cover advances; that the bill was drawn and indorsed in the name of "S. H. Head" in the same handwriting, and accepted by the defendant; that the manager, after making inquiries at the defendant's bankers and receiving a satisfactory reply, made an advance equal to the full value of the bill. Villars stated that his firm had furnished one Samuel Head's offices, and it was admitted that the plaintiffs took the bill in good faith and without notice of any irregularity.

On the part of the defendant, he himself was called and proved that, being in want of money, he applied to an advertising money-lender calling himself Tillotson Smith, who undertook to obtain for him a loan of 400*l.*, upon his giving a bill for 500*l.*, and that upon the faith of this, he gave to Smith a piece of paper bearing a sufficient stamp, with his, the defendant's, signature across it where acceptances are usually written; nothing was said as to who should draw or indorse the bill, but the person calling himself Tillotson Smith gave to the defendant a receipt as follows:—

"12th March, 1878.

"Received of Capt. W. D. Wentworth an acceptance for 500*l.*, dated to-day for the purpose of negotiation, and if not discounted by the 14th instant to be returned at once.

"Tillotson Smith & Co."

(1) 3 Q. B. D. 643. (2) 3 Q. B. D. 525.

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And Mr. Samuel Heath Head proved that he was a solicitor having offices in the same house as Tillotson Smith & Co. He was then asked whether the indorsement of the bill was in his handwriting, but the question was objected to upon the ground that it was immaterial, and I rejected it.

Upon these facts, and an admission that the plaintiffs were bonâ fide holders for value, I ruled that they were entitled to recover, and directed the verdict and judgment to be entered for them.

An order nisi for a new trial was subsequently obtained, upon the ground that I ought to have admitted the evidence objected to, inasmuch as if the indorsement could be shewn to be irregular, the plaintiffs could not succeed; and that although the defendant by his signature must be taken to have admitted the drawing by "S. H. Head," he was not precluded from shewing that the indorsement was unauthorized. These questions were fully argued before my Brother Hawkins and myself, and we took time to consider what our judgment should be.

Before dealing with the rules of law by which the case should be governed, we think it well to state what we consider to be the result of the facts proved.

It was manifest that the defendant had been cheated out of the blank acceptance (1), but it was equally clear that he had given it for the purpose of having the name of a drawer and indorser inserted, and of its being negotiated to raise money. The name of the drawer and indorser was perfectly immaterial to the defendant, and could the name used be taken to be a fictitious name, the defendant would be liable. It was also admitted upon the argument that the defendant could not dispute that he was bound by the drawing of the bill, but it was said that he might dispute the indorsement. Now, the indorsement may be treated in two ways. It may be said that although a Mr. Samuel Heath Head was called to state that he never indorsed or authorized the indorsement of his name, this does not shew that it was a forgery, for S. H. Head might not mean Samuel Heath Head, and there might be several S. H. Heads, or the signature might be wholly fictitious; in which case, as the drawer's and indorser's

(1) He had received no money for his acceptance.

names were in the same handwriting, they would be binding on the defendant.

But the evidence, taken as a whole, seemed rather to shew that Smith, when he had obtained the blank acceptance, wrote the name of S. H. Head upon it, with the full knowledge that there was a Samuel Heath Head who had had dealings with Villars, and that he did this not with the intention of defrauding the defendant, nor indeed under the impression that Head would in fact be defrauded, since he supposed, no doubt, that the bill would be met by the defendant, but because if Head's name was on the bill he would the better be able to pass it on to Villars to discount, and as against the plaintiffs who objected to the evidence of Head, we think this is the fair assumption; and we also think it ought to be assumed that if Head had been allowed to answer he would have said that he usually signed his name "S. H. Head," and consequently that the use of his name was as against him a forgery, the effect of which would be to cast an apparent liability upon him if the defendant did not pay the bill.

This is the most favourable way of putting the case for the defendant, because it may be said that although by giving the blank acceptance he authorized the person to whom he gave it to insert some name, even a fictitious name, as drawer and indorser, he could not have intended to authorize him to commit a forgery, and if effect is to be given to this argument it would equally hold good with respect to the drawing as to the indorsing.

This, no doubt, raises a novel question, and one of some difficulty. It must be governed by the rules of law applicable not to cases in which the acceptor has signed his name after that of the drawer has been inserted, and so upon the faith of that name, but by those which ought to prevail where the acceptor has signed his name upon a blank piece of stamped paper, or on a paper upon which a drawing in blank has been written. In such a case, the acceptor is liable to a bonâ fide holder for value without notice, if the name of a stranger or a fictitious name be inserted as drawer, and the reason for this is not because the acceptor gave authority for this or that name to be inserted,—for in truth he gave no such authority,—but because in favour of commerce it is essential to uphold the negotiability of bills of

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exchange. That this is so, may be further illustrated by a case in which a fraud is practised upon the acceptor of a bill drawn in blank with reference to the amount.

A., owing a debt of 50*l.* to B., writes to him enclosing a blank paper with a stamp sufficient to cover a bill for 100*l.*, saying: "I do not know the exact amount of my debt, but fill up the enclosed for the amount and I will honour it at three months." B., in fraud of A., draws the bill for 75*l.*, indorses it, and it comes into the hands of a bonâ fide holder for value. Here is a clear absence of authority and a fraud against A., yet he is liable, and for the reason we have given. In the present case, although Smith was guilty of a fraud against the defendant collateral to the bill itself, the inserting of Head's name was, as respects the defendant, wholly immaterial, and was no part of the transaction by which the defendant parted with the blank acceptance. To him the result would have been the same in every respect, whether Smith had procured the wealthiest banker or the veriest pauper to actually sign his name as drawer or had himself inserted as drawer his own name, that of a stranger, a fictitious name, or that of Head, for in any case the defendant would be ultimately liable. Looking next to the effect upon the plaintiffs, with reference to the circumstances under which they took the bill, can it be said that the fact that Head's name appeared as drawer made any difference? They gave value for it, had no notice of fraud, and the forgery was no part of the transaction whereby they acquired the bill; they made all the inquiries as to the acceptor from his own banker that could be demanded from the most prudent persons. To require more of them, and say that they ought to have unravelled all the history of the bill, its drawing and indorsement, would be to create a new burden and cast a new duty upon indorsees of bills of exchange for which there is no precedent, and which would go far to hamper their negotiability and destroy their usefulness. Moreover, it would graft an exception upon a system of law which has worked well and is of great public use, for the benefit of one who has brought about the difficulty by his own irregular act.

It may be said that this course of reasoning would apply to the case of a bill drawn and accepted in due course and indorsed by a

forgery of the drawer's name, in which case the acceptor would not be liable even to a bonâ fide holder for value, but the two cases are not in pari materiâ. In the case last put the drawing and accepting of the bill are in proper order, and the acceptor is entitled to say: I accepted on the faith of the bill being drawn by a person of credit, and I am ready to pay to his order, but not to the holder of a forged indorsement. In such a case, the whole matter, quoad the acceptor, is real, and depends upon a real authority. In the present case, the defendant is in default from the beginning by giving a blank acceptance, and therefore, as is admitted in the cases of a drawing by a stranger or in a fictitious name, the ordinary rule as to authority cannot be adhered to, and something like a fiction must be resorted to in favour of a bonâ fide indorsee for value; or, as we should prefer to say, the law merchant in such a case holds that, although the acceptor did not authorize the drawer's name to be used, he enabled the person to whom he gave the bill to use it, and so to give the bill currency, and this as against the acceptor is sufficient to render him liable. Further, where an indorsement is forged there is a material distinction between the case of a bill drawn by a real person and one like that now under consideration, which materially affects the rights of the parties. Where the bill is drawn by a real person, not only have those who claim under a forged indorsement no title to the bill, but the title is in some one else who is entitled to have the bill restored to him and to sue upon it; and to his action a plea of payment to the man who claims under the forgery would be no defence. In the present case there is no real drawer, and the defendant could have paid the plaintiff without the risk of having to pay it a second time to another.

Let us now see to what extent the principles which are involved in the decision of this question have been considered and settled. Where a man signs his name to a blank stamped piece of paper, and delivers it to another to be negotiated, this gives him authority to fill it up to the amount which the stamp will cover, treating the signature as that of the acceptor, and if the bill thus completed is indorsed to a holder for value without notice, he is entitled to recover upon it against him who has so signed his name, although the person to whom the blank paper is originally

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given may have defrauded the man who gave it to him. This is clearly established by a long series of cases, amongst which are the following:—*Russel* v. *Langstaffe* (1780) (1), *Peacock* v. *Rhodes* (1781) (2), *Collis v. Emett* (1790) (3), and *Schultz* v. *Astley* (1836). (4)

The ground upon which these decisions have been rested is well explained by Maule, J., in *Montague* v. *Perkins* (5), and in the judgment of the Court in *Foster* v. *Mackinnon* (6), where after stating the general proposition that a man is not bound by his signature to an instrument if it be obtained by a fraudulent representation, it is said: "This principle when applied to negotiable instruments must be and is limited in its application. These instruments are not only assignable, but they form part of the currency of the country. A qualification of the general rule is necessary to protect innocent transferees for value. If, therefore, a man write his name across the back of a blank bill stamp, and part with it, and the paper is afterwards improperly filled up, he is liable as indorser. If he write it across the face of the bill, he is liable as acceptor, when the instrument has once passed into the hands of an innocent indorsee for value before maturity, and liable to the extent of any sum which the stamp will cover."

In *Cooper* v. *Meyer* (1830) (7), bills having been drawn in a fictitious name, and accepted by the defendant and indorsed in the same handwriting as that of the supposed drawer, the defendant was held liable to the plaintiff who was a holder for value. Lord Tenterden in giving judgment says: "The acceptor ought to know the handwriting of the drawer, and is, therefore, precluded from disputing it; but it is said that he may nevertheless dispute the indorsement. Where the drawer is a real person, he may do so, but if there is in reality no such person, I think the fair construction of the acceptor's undertaking is that he will pay to the signature of the same person that signed for the drawer."

In the above case the bill was accepted after it was drawn, and

(1) 2 Dougl. 514.
(2) 2 Dougl. 633.
(3) 1 H. Bl. 313.
(4) 2 Bing. N. C. 544.
(5) 22 L. J. (C.P.) 187.
(6) Law Rep. 4 C. P. at p. 712.
(7) 10 B. & C. 468.

Lord Tenterden appears to have thought that in such a case if the drawer be a real person the acceptor, though bound by the drawing, may dispute the indorsement. The same view was taken by this Court in *Beeman* v. *Duck* (1843) (1), and is in accordance with what was laid down with reference to such bills in *Smith* v. *Chester* (1787) (2) and *Robinson* v. *Yarrow* (1817). (3) Not long after *Cooper* v. *Meyer* (4), however, came the case of *Schultz* v. *Astley* (1836). (5) The defendant had given to a money lender, among others, two slips of stamped paper, on which were written acceptances signed by himself, and for which he received nothing; a man named Clissold afterwards wrote his name on one of these, and it was then filled up as a bill of exchange. The second paper was filled up as a bill of exchange by a person who subscribed himself in the character of drawer and indorser as Thomas Wilson, his real name being Thomas Wilson Richardson. The two bills having been indorsed to the plaintiff for value, he sued the defendant upon them, and the Court held that he was liable, and in giving judgment say (6): "As to the bill drawn by Clissold the objection is, that admitting a party may be bound by his acceptance written on a blank piece of stamped paper, to the extent of such sum as the stamp will cover, yet that this giving of a blank acceptance authorizes only the party to whom it is given to draw the bill; or at all events does not authorize Clissold, a stranger, to sign his name on the same blank piece of paper as drawer, the bill itself being subsequently written upon the paper by some other person. No authority has been cited to us for any such restriction of the general doctrine above admitted; nor can we see any distinction in principle where the bill has passed into the hands of third persons, between holding the acceptor liable to a given amount, when the bill is afterwards drawn in the name of the party who has obtained the acceptance, and when it is drawn by a stranger who becomes the drawer at the instance of the party to whom the acceptance is given. The blank acceptance is an acceptance of the bill which is afterwards put upon it; and it seems to follow from the doctrine of Lord Mansfield in *Russell*

(1) 11 M. & W. 251.
(2) 1 T. R. 654.
(3) 7 Taunt. 455.
(4) 10 B. & C. 468.
(5) 2 Bing. N. C. 544.
(6) 2 Bing. N. C. at p. 552.

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v. *Langstaffe* (1), that it does not lie in the mouth of the acceptor to say that the drawing or indorsing of the bill is irregular. The acceptor was a stranger to the party to whom he handed over his blank acceptance, and as all that he desired was to raise the money, it could make no difference to him, either as to the extent of his liability, or in any other respect, whether the bill was drawn in the name of one person or another. And if the defendant is estopped from denying the right of the drawer to draw the bill, whoever he may be, he is bound by the indorsement made by such drawer, after such indorsement is proved to have been made by such drawer.

"As to the bill which purports to have been drawn by Wilson, the proof was that it was drawn and indorsed by a real person, who signed the name Thomas Wilson, although his real name was Thomas Wilson Richardson. There were no circumstances proved to shew an intention to pass himself off for a different person of the name of Thomas Wilson, or an intention to defraud any person of that name, or any other person; and we, therefore, think there is no ground for treating the signature as a forgery, or holding the bill void on that account."

We have cited the remarks of the Court as to both of the bills, although those as to the second bill may appear to be not in accordance with the view we have taken, but it is to be observed that the observations as to forgery were unnecessary to the decision of the case, and the question which has arisen in the present case was not before the Court. The principles which are laid down with reference to the first bill, if applied to the facts before us, would go far to decide the point of law in the plaintiffs' favour.

In many of the cases and text-books in which the liability of the acceptor of a bill of exchange under circumstances similar to those which occurred in the present case has been discussed, it has been rested upon the ground of estoppel; and with reference to this, Bramwell, L.J., has recently said with great force in the case of *Baxendale* v. *Bennett* (2), "Estoppels are odious, and the doctrine should never be applied without a necessity for it. It never can be applied except in cases where the person against

(1) 2 Dougl. 514.

(2) 3 Q. B. D. 525, at p. 529.

whom it is used has so conducted himself, either in what he has said or done or failed to say or do, that he would, unless estopped, be saying something contrary to his former conduct in what he had said or done or failed to say or do." This language might be not improperly applied to the present case, but, for our own part, we should prefer not to use the word estoppel, which seems to imply that a person by his conduct is excluded from shewing what are the true facts, but rather to say that the question is whether, when all the facts are admitted, the acceptor is not liable upon the well known principle that where one of two innocent persons must suffer from the fraud of a third, the loss should be borne by him who enabled the third person to commit the fraud. Looking at the case from this point of view, the law as laid down in *Young* v. *Grote* (1), where the Court held that the drawer of a cheque who so carelessly fills it up as to enable the holder of it to add figures making it payable for a larger amount is liable to the banker who honours it, is in favour of the plaintiff, and although many observations have been made since that case with reference to the grounds upon which it was decided, which are mostly collected in the judgment of the Common Pleas Division in *Arnold* v. *Cheque Bank* (2), the principle we have alluded to has always been upheld. In the *Bank of Ireland* v. *Evans' Trustees* (3), Baron Parke, speaking of *Young* v. *Grote* (1), said: "In that case it was held to have been the fault of the drawer of the cheque that he misled the banker on whom it was drawn by want of proper caution in the mode of drawing the cheque, which admitted of easy interpolation, and consequently that the drawer having thus caused the banker to pay the forged cheque by his own neglect in the mode of drawing the cheque itself, could not complain of that payment."

Our attention was called during the argument for the defendant to two recent cases decided by the Court of Appeal—*Hogarth* v. *Latham* (4) and *Baxendale* v. *Bennett* (5), but neither of these have any real bearing upon the present case. In the first the plaintiff received only a bill accepted by the defendant, but without any drawer's name. At this time he had no notice of any irregularity,

(1) 4 Bing. 253.
(2) 1 C. P. D. 587.
(3) 5 H. L. C. 389, at p. 410.
(4) 3 Q. B. D. 643.
(5) 3 Q. B. D. 525.

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but afterwards, when he filled in the name of his firm as drawers of the bill, the jury found he had notice that there was something wrong, and the bills had in fact been accepted without authority. In *Baxendale* v. *Bennett* (1) the bill sued on bore the defendant's signature, and purported to have been drawn and indorsed by Cartwright, and also indorsed by Cameron, from whom the plaintiff received it, but before it had been so drawn or indorsed, and whilst it was a mere blank paper with a bill stamp and the defendant's signature upon it, it was stolen from the defendant's drawer, and therefore never had been given to Cartwright or any one from whom he received it, to be negotiated or in any way treated as a bill of exchange.

In conclusion, it may be added that no assistance can be gained in the present case by reference to the law of France relating to bills of exchange, or to the codes of other continental nations, which are mostly founded upon that of France, and this for a reason which appears to us to give weight to the arguments adduced in favour of the plaintiffs. By the Ordonnance of 1673, which is referred to by Pothier in his Traité du Contrat de Change, part I., ch. 3, s. 1, it was made essential to a bill of exchange that it should mention the drawer, acceptor, and payee, and the law remains in substance the same, as will be seen by referring to the Code de Commerce, Art. 110, so that a blank acceptance is inadmissible. The distinction between the English and the French system is well described by Mr. Chalmers in the Preface to his valuable Digest of the Law of Bills of Exchange, where he says, The French Law "remains in substance what it was two hundred years ago. English Law has been developed piecemeal by judicial decision founded on custom. The result has been to work out a theory of bills widely different from the original. The English theory may be called the Banking or Currency theory, as opposed to the French or Mercantile theory. A bill of exchange in its origin was an instrument by which a trade debt due in one place was transferred in another. It merely avoided the necessity of transmitting cash from place to place. This theory the French Law steadily keeps in view. In England, bills have developed into a perfectly flexible paper currency. In France a bill represents

(1) 3 Q. B. D. 525.

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a trade transaction; in England it is merely an instrument of credit. English Law gives full play to the system of accommodation paper; French Law endeavours to stamp it out."

That this is a correct account of the spirit in which the English Law has dealt with the negotiability of bills of exchange is further evidenced by the mode in which effect is given to it in favour of bonâ fide indorsees for value by modern legislation. Thus the earlier Acts, 16 Car. 2, c. 7, and 9 Anne, c. 14, wholly avoided certain securities given for a gaming consideration, but the 5 & 6 Wm. 4, c. 41, s. 1, after reciting the hardship and injustice which arises where such securities are indorsed for a valuable consideration without notice, repeals the earlier provisions, and provides merely that such securities shall only be taken to have been given for an illegal consideration, leaving the rights of bonâ fide holders for value without notice of the original illegality intact.

In the result, therefore, it appears to us that there is no authority binding upon us which requires that we should give judgment for the defendant, and that the spirit of such authorities as can be found are in favour of the plaintiffs, and accord with what, in our view, are the legal merits.

The order nisi for a new trial will therefore be discharged with costs.

Order discharged.

Solicitors for plaintiffs: *Vallance & Vallance.*
Solicitor for defendant: *C. A. Hilliard.*

1880
Jan. 21.

[IN THE COURT OF APPEAL.]

WEBB *v.* EAST.

Practice—Production of Documents—Privileged Communications—Tendency to Criminate.

10 QBD 463

A party cannot protect himself from producing a document on the ground that its production would tend to criminate him unless he pledges his oath that, to the best of his belief, its production would tend to criminate him.

Whether a party can protect himself from producing a document on the ground that its production would tend to criminate him, *quære.*

A letter written in answer to inquiries about the character of a servant is privileged in this sense only, that although it contains defamatory statements it will not support an action for libel unless malice is shewn; but it is not privileged in the sense of being privileged from production, such privilege being confined to communications with the legal advisers of the party.

THIS was an appeal from a decision of the Exchequer Division. (1)

The plaintiff's statement of claim, was to the following effect:—

That the plaintiff had been the steward of the estates of the defendant, and quitted the defendant's service at the notice of the defendant in March, 1879, and received from the defendant a written character, dated the 3rd of March, 1879. That on the 8th of April, 1879, the plaintiff was engaged as steward by Earl Rosslyn, and was to enter on his duties on the 14th of that month. That on or about the 9th of April, 1879, the defendant, in letters addressed to Earl Rosslyn, falsely and maliciously made certain defamatory statements about the plaintiff, which were set out in the statement of claim, being, inter alia, that the plaintiff had falsified his accounts and misappropriated moneys. That in consequence of the said libels Earl Rosslyn refused to allow the plaintiff to enter upon his duties as steward, and dismissed him from his service. That by reason of the premises, the plaintiff had lost the salary and remuneration he would have earned in the service of Earl Rosslyn, and had been unable to obtain another situation as steward, and had been greatly damaged in his credit and reputation.

By his statement of defence the defendant denied that he wrote

(1) 5 Ex. D. 23.

to Lord Rosslyn the letters mentioned in the statement of claim, or any of them, and stated that any letters written by him to Earl Rosslyn relating to the plaintiff were confidential and privileged communications, and written by the defendant in answer to inquiries made by Earl Rosslyn as to the character of the plaintiff, who had been in the employ of the defendant as his steward.

The defendant, in answer to interrogatories, deposed that he did, on or about the 9th or 10th of April, 1879, and the 14th of April, 1879, respectively, write a letter to Lord Rosslyn. "Those letters will speak for themselves. They were written by me in consequence of letters which I had received from Lord Rosslyn relating to the plaintiff who had been my steward. My letters to Lord Rosslyn were confidential, and I contend that they are privileged communications." He went on to admit that he had copies of them in his possession.

The plaintiff applied for inspection and liberty to take copies of, and extracts from, the above copies. This was refused by the Master. Upon appeal, Denman, J., referred the application to the Divisional Court.

The case was heard by Kelly, C.B., and Stephen, J., who, on the 12th of December, 1879, made an order for inspection, on the ground that the defendant could only protect himself from production by stating on oath that he believed the production of the documents would expose him to a criminal prosecution. (1) The defendant appealed.

Fischer, Q.C., and *R. E. Turner*, for the defendant. Production ought to be refused on the ground that it may expose the defendant to a criminal prosecution. It is not necessary that this objection should be taken on the oath of the defendant, it appearing from the nature of the case that production would tend to criminate him: *Hill* v. *Campbell* (2); *Atherley* v. *Harvey*. (3)

[JESSEL, M.R. According to the rule in equity a defendant was not bound to answer where doing so might tend to criminate him, but is there any authority that he can decline to produce a document because it might tend to criminate him?]

Cartwright v. *Green* (4) is in the defendant's favour.

(1) 5 Ex. D. 23.
(2) Law Rep. 10 C. P. 222.
(3) 2 Q. B. D. 524.
(4) 8 Ves. 406.

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[JESSEL, M.R. That case does not relate to production.]

Secondly, the letters are privileged: *Gardner* v. *Slade.* (1) The plaintiff has no case unless he can shew express malice, and until that is shewn production ought not to be ordered.

[JESSEL, M.R. May not the case come within Order XXXI., rule 19. Ought not the question of express malice to be tried before production is ordered? It is a very serious matter if every servant who receives such a character that he is not engaged can bring an action for libel, and obtain production of all the letters that have passed.]

It is contended that the issue of malice ought to be first tried, to allow production in such cases will tend to make masters refuse to give any character at all.

[COTTON, L.J. It seems to me that the letters themselves may possibly prove express malice.]

There ought to be some primâ facie evidence of malice—this is a mere fishing application. The plaintiff professes to set out extracts from the letters in his statement of claim, but he does not really know their contents.

[Counsel for the plaintiff admitted this to be the case.]

Bompas, Q.C., and *P. H. Smith*, for the defendant. No case can be found where production of documents has been refused on the ground of their tending to expose the party to prosecution except *Hill* v. *Campbell.* (2) It is difficult to reconcile that case with *Fisher* v. *Owen* (3), and the judges were agreed that at common law inspection might have been ordered. *Atherley* v. *Harvey* (4), as is stated in *Fisher* v. *Owen* (3), went on a misunderstanding of the rule in equity. *Allhusen* v. *Labouchere* (5) supports the plaintiff's case. Then as to privilege, the defendant is confusing the two meanings of the word. Confidential communications of this kind are privileged only in the sense that they are not treated as libels unless malice is shewn; but they are not privileged from production, that privilege being confined to communications with legal advisers, *Bustros* v. *White* (6): which also shews that there is no discretion as to refusing production.

(1) 13 Q. B. 796.
(2) Law Rep. 10 C. P. 222.
(3) 8 Ch. D. 645.
(4) 2 Q. B. D. 524.
(5) 3 Q. B. D. 654.
(6) 1 Q. B. D. 423.

Fischer, Q.C., in reply.

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JESSEL, M.R. The question raised by this appeal is one of very considerable importance as regards the interests of society at large, and especially as regards the interests of that large part of society which consists of masters and servants.

The case for the present purpose may be shortly stated in this way. A steward of Sir Gilbert East left his service. He afterwards applied for a similar situation under the Earl of Rosslyn. The Earl of Rosslyn was willing to engage him, and did in fact engage him, subject to his character proving satisfactory. He wrote to Sir Gilbert East about the man, and received a letter in answer giving him what Lord Rosslyn thought was a bad character, and thereupon his lordship declined the man's services. The man then brought an action against Sir Gilbert East for libel. Of course such an action can only be maintained by establishing that material statements as to the character of the servant were not only untrue, but were untrue, if I may put it in that way, to the knowledge of Sir Gilbert East, and were stated maliciously and not with the bonâ fide intention of giving the man a fair character, but with a view to prevent his getting a new service.

The plaintiff in the action has neither the letter that was written by Sir Gilbert East nor a copy of it. Lord Rosslyn has the original letter, Sir Gilbert East has a copy of it, and the plaintiff wishes to obtain that copy from Sir Gilbert East.

Now it is manifest that the copy in question is material on every issue in the cause. The nature of the charges, if charges they were, made against the servant in the letter, must have a considerable influence upon the decision of the issue as to whether they were false charges, also as to whether they were false to the knowledge of the defendant, and as to whether, from their nature, they were instigated by malice. It is impossible not to see, therefore, that it is a very material document in the case.

The defendant says that the document is privileged. It is privileged in this sense, that it is what is called a privileged communication, which I understand to mean this, that primâ facie, that is, in the absence of evidence to the contrary, it is to be

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considered as being given bonâ fide and without malice, and is an exception to the rule that a man who libels another must, in order to justify himself, prove the truth of the libel, it being in this case for the plaintiff to prove the malice. But such a communication is not privileged, as far as I am aware, in any other sense. I never before this case heard it suggested that such a letter was privileged in the sense of being privileged from production, except on the ground which is now suggested, that it may criminate the defendant. Now it is obvious that it cannot have that tendency unless the action ought to succeed, because the letter cannot be a libel unless the defendant was actuated by malice. He therefore cannot plead that the document would criminate him without at the same time confessing the action. If such a defence could be available at all it ought only to be available at the instance of a defendant who will undertake to swear that the production of the document will criminate him.

It is not necessary on the present occasion to give, nor do I intend to give, an opinion as to whether documents can be protected from production by an allegation on oath that if produced they would criminate, or tend to criminate, the person asked to produce them, by which I mean that they would support an indictment against him. I decline to decide that point, not because I have not an opinion on the subject, but because it is not necessary for me now to express it. But even assuming, for the purpose of argument, that such a ground could avail a defendant called upon to produce such a document, it is clear to my mind that it could only avail him on such terms as it could avail him in answering interrogatories or giving other discovery, namely, upon his pledging his oath that to the best of his knowledge, information, and belief, the result of his production of the document would be to criminate him.

Now, as I have already said, it is quite impossible for the defendant in this case to make such an affidavit, and therefore there is no occasion to give him the opportunity of making it. He never could be advised to make it, and would not make it. That being the case, it appears to me that this is a document which is not privileged from production, and that consequently the order of the Court below was right and ought to be affirmed.

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BAGGALLAY, L.J. I am also of opinion that the production of these letters cannot be refused on the ground of privilege. That such documents are privileged in a certain and very common sense of the word is no doubt true, but they are not privileged documents within the meaning of the decision in the case of *Bustros* v. *White* (1), in which the question of what were documents entitled to protection on the ground of privilege arose and was very fully considered by the Court consisting of numerous judges. The marginal note in that case lays down the rule as to what are the documents to which privilege applies, viz., that no document other than a document of title is privileged except a communication from the party's solicitor or from an agent employed by or at the instance of the solicitor.

But then it is said that the production ought to be refused upon the ground that the inspection of the copies or the letters might tend to expose the defendant to criminal proceedings. Now I agree that if that could be a sufficient reason for refusing to permit the inspection of the documents, it is a reason which must be verified by the oath of the party who seeks to rely upon it. In this case, and probably for the best of reasons, the defendant's advisers do not ask for the opportunity of making such an affidavit, and I must confess I think there is great force in the observation of Mr. Bompas that to make such an affidavit would be inconsistent with the nature of the defence which has been raised. It therefore is not necessary to consider what would be the effect if such an affidavit had been produced.

COTTON, L.J. I am also of opinion that we cannot refuse production of these documents. The Court in these cases has not to exercise any discretion. If the plaintiff can claim production it is of right. The general rule is undisputed that a litigant plaintiff or defendant has a right to the production of all documents in the possession of his opponent which are relevant to the issues to be decided in the action. In the present case it cannot be disputed that the production of these letters is material both with regard to the question whether certain defamatory statements were made and also upon the question whether or

(1) 1 Q. B. D. 423.

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no they were made under such circumstances as to be privileged.

Upon what ground, then, does the defendant refuse production? He relies upon two grounds, one is, that the production of the letters would tend to criminate him, that is to say, would tend to subject him to criminal proceedings for libel. I agree that it is better not to express an opinion as to whether that is any protection from production of documents. But I also agree with the rest of the Court that if that is a ground for refusing production as it is for refusing to answer interrogatories, the protection must be claimed by the party seeking to protect himself from discovery in the same way as he would claim to protect himself from answering interrogatories, that is to say, by making an affidavit pledging his belief that answering the question would tend to criminate him.

With regard to the other question of privilege, the whole argument turns upon the ambiguous meaning of the word privilege. No doubt we are in the habit of saying that the Court may refuse production of documents upon the ground that they are privileged, which means that they are privileged as communications between a party and his legal adviser. The documents now in question are no doubt in a sense privileged if the defendant is right in saying that they were letters written bonâ fide in answer to inquiries about a servant—but privileged in what sense? Not privileged from production, but privileged in this sense only, that although they may contain defamatory statements, the law under the circumstances will not impute malice, but the plaintiff, in order to sustain an action for libel upon them, must shew that they were written maliciously.

Then ought we to extend to such documents as these the rule as to privilege from production? No doubt it may be very inconvenient to produce letters such as those in this case, but for a long series of years courts of equity have been strict in refusing to extend the rule as to privilege from production, and in my opinion we ought not now to make this extension, but ought to adhere to the old rule and say that privilege from production on the ground of the document being a privileged communication extends only to communications between a plaintiff or a defendant and his legal advisers.

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I ought to add that the language of my judgment in the present case must not be taken in any future case as any intimation that I should not have directed the documents to be produced even if there had been an affidavit made by the defendant.

BAGGALLAY, L.J. I may also say that I desire to keep my judgment open upon that point.

Solicitors: *Parkers; Williams, James, & Wason.*

[IN THE COURT OF APPEAL.]

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Dec. 13.

JONES AND OTHERS *v.* HOUGH AND OTHERS.

Ship and Shipping—Charterparty—Bills of Lading, Master refusing to sign—Conversion of Cargo—Practice—Trial by Judge without Jury—Motion for new Trial.

By a charterparty the defendants agreed to carry for the plaintiffs a cargo of coke from C. to B. the master to sign the bill of lading as presented within twenty-four hours after the cargo should be on board, or pay 4*d.* per ton per day for each day's delay as damages. The cargo having been loaded, a bill of lading was presented to the master, which he refused to sign without inserting a clause that the vessel should not be liable for duties on cargo caused by non-arrival before a specified date. The plaintiffs having declined to accept such a bill of lading, the master sailed with the cargo for B. without signing any bill of lading. The plaintiffs directed their consignee to deduct the penalty under the foregoing clause. The master was willing to deliver the cargo on payment of the freight in full, but the consignee having insisted upon deducting the penalty, the master declined to deliver the cargo, and landed it and stored it at B.:—

Held (1.), That there had been a breach of the charterparty in the master not having signed the bill of lading as presented to him. (2.) That the plaintiffs were not entitled to deduct the penalty for delay in signing the bill of lading. (3.) That there had been no conversion of the cargo. (4.) The plaintiffs were only entitled to nominal damages for not signing the bill of lading, the master being willing to deliver the cargo on payment of the full freight.

Where a trial has taken place before a judge without a jury, the Court of Appeal, in all cases except that of surprise, has jurisdiction upon an appeal to review the findings as to the facts, without a rule for a new trial having been obtained.

ACTION upon a charterparty, the claim alleging by way of breach that the master of the ship *Ellen*, acting by the direction of the defendants, would not sign certain bills of lading as presented, according to the charterparty, unless he were permitted

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to insert therein the words "the vessel not liable for duties on cargo caused by non-arrival before 1st July;" and also alleging, in the alternative as to damages, that the sum of 488*l.* 16*s.* had become due from the defendants to the plaintiffs for delay in signing the bills of lading at the rate of 4*d.* per registered ton per day, as per charterparty, on 611 tons for forty-eight days from the 1st of July, 1877, to the 18th of August, 1877, when the action was commenced. And, further, the plaintiffs sued for the wrongful conversion of the plaintiffs' coke.

At the trial before Lindley, J., without a jury, at the London sittings on the 26th of March, 1879, the following facts were proved: On the 13th of June, 1877, a charterparty was entered into between the plaintiffs and defendants, the material parts of which were that the ship *Ellen*, of which the defendants were owners, should proceed to Cardiff, and there take on board as tendered a cargo of coke, which the merchants bound themselves to provide for shipment, and should therewith proceed to Bilbao, and there, as ordered, deliver the same on being paid freight at the rate therein mentioned, the ship paying all charges whatsoever, the freight to be paid one-third (if required) in cash on signing bills of lading, less 3 per cent. for all charges, and the remainder on right delivery of cargo in cash at the current rate of exchange, cargo to be brought and taken alongside at merchants' risk and expense. A sufficient quantity of coal to be taken on board for ship's use, to be supplied by shippers at 10*s.* per ton, to be indorsed on bills of lading, which documents the master thereby agreed to sign, as presented for the weight according to the railway company's or shipping returns, without prejudice to the tenor of the charterparty, within twenty-four hours after the cargo should be on board, or pay 4*d.* per registered ton per day for each day's delay as damages; the ship to be addressed inwards only to charterers' agent at port of discharge, paying the usual commission of 2 per cent. on the charter. The charter being concluded by Richard W. Jones & Co. (the plaintiffs) on behalf of others, it was agreed that all liability of the former should cease as soon as they had shipped the cargo, the ship having a lien upon the same for all freight, dead freight, demurrage, average, and other charges.

At the time of making the charterparty the vessel was on a voyage to Newport, and after her arrival at Cardiff the plaintiffs, being under the impression that if the ship did not arrive at Bilbao by the 30th of June the Spanish Government would increase the duties then payable on coke, and being anxious therefore that the vessel should arrive at Bilbao by that day, wrote to the defendants on the 22nd and the 25th of June, 1877, complaining of delay on the part of the shipowners in discharging the cargo which was then on board, and pointing out to them the importance of the ship arriving by the 30th of June.

At the time of making the charterparty the plaintiffs had contracted with Ybarra & Co., at Bilbao, for the sale to them of 500 tons of coke to be shipped in England, and consigned to them at 23*s.* per ton, including freight and insurance. The plaintiffs advised Ybarra & Co. of having entered into the charterparty, and sent them a copy. On the 23rd of June the plaintiffs wrote to Ybarra & Co., telling them that they would have to deduct the extra duties which might be imposed on coke from the freight. It appeared, however, that the plaintiffs' fears in this respect were unfounded, and that the Spanish Government had not imposed any increased duties on coke.

On the 30th of June, 1877, the plaintiffs presented to the master of the vessel at Cardiff bills of lading for the coke deliverable to order for his signature according to the terms of the charterparty. The defendants were apprehensive that some attempt would be made to stop the increased duties if they became payable from the freight when the ship arrived at Bilbao, and on their instructions the master declined to sign the bills of lading in the ordinary form, but insisted on inserting the words following: "The vessel not liable for duties on cargo by non-arrival before the 1st July." A discussion ensued, in which the plaintiffs insisted that the master should sign the bills of lading or take the consequences: and the defendants offered that on the plaintiffs guaranteeing that no stoppage should be made, to sign the bills of lading.

On the 30th of June the vessel sailed from Cardiff with the coke on board without the master having signed bills of lading, and arrived at Bilbao on the 4th of July, 1877.

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The plaintiffs in the meantime had sent the bills of lading unsigned by the master to Ybarra & Co. indorsed to them, and on the 30th of June wrote requesting them to deduct 4*d.* per ton per day from the freight under the clause in the charterparty as the penalty for not signing bills of lading.

On arrival at Bilbao the master having been told by the plaintiffs at Cardiff that the cargo of coke was consigned to Ybarra & Co., moored the ship at their wharf and allowed the discharge to commence; but having been informed by Ybarra & Co. that they were going to deduct 50*l.* from the freight owing to his not having signed the bills of lading at Cardiff, the master refused to allow the deduction, and stopped any further delivery; fifty tons of coke, however, had been delivered. Ybarra & Co. having declined to pay the full freight for the coke, the master, therefore, discharged the remaining portion of the cargo at another wharf and stored it.

On these facts the learned judge decided: 1. That the defendants had been guilty of a breach of the charterparty in not having signed the bills of lading; 2. That the plaintiffs were not entitled to deduct the 4*d.* per ton per day from the freight; 3. That the defendants in taking away in their ship the plaintiffs' coke had converted the coke to their own use, and he directed a verdict to be entered for the plaintiffs for 399*l.* 17*s.* 6*d.*

The defendants appealed, on the ground that the judgment should be entered for the defendants.

They also obtained a rule for a new trial, on the grounds of misdirection, of the verdict being against the weight of evidence, of excess of damages, and of surprise.

Dec. 11, 1879. *Holl, Q.C.*, and *Douglas Walker*, for the defendants, contended: first, that the plaintiffs, by threatening to deduct the amount to be paid by them for additional duties rendered it incumbent on the master to protect his owners by inserting in the bill of lading the clause objected to; and that the plaintiffs ought to have accepted the bill of lading with such clause, for its insertion would not have affected the title to the cargo nor the negotiability of the bill of lading: and even if the plaintiffs had been compelled to pay the duties, the clause would

not have estopped them from recovering from the defendants if they were liable; there was, therefore, no breach of the charterparty by the defendants, the master being willing to sign the bill of lading in the form suggested; secondly, that the plaintiffs had no right to deduct the penalty, for on the construction of the clause the liability was only to attach in cases where the bill of lading had actually been signed after a delay in doing so; thirdly, that there had been no conversion, for the carrying the coke to Bilbao was in accordance with the terms of the charterparty.

Dec. 12, 13, 1879. *Cohen, Q.C.*, and *Jelf*, for the plaintiffs, contended: first, that there had been a breach of the charterparty, for it was the duty of the master to sign the bill of lading as presented, and under the charterparty he had no right to insert any additional term in the bill of lading; secondly, that the plaintiffs were entitled to deduct the penalty for the delay; thirdly, that on the authority of the cases of *Falke* v. *Fletcher* (1), *Hiort* v. *Bott* (2), and *Peek* v. *Larsen* (3), by sailing from the port of loading without the bill of lading having been signed the defendants had been guilty of a conversion of the coke.

They also contended that even if the findings of fact by the judge were wrong, yet while they stood unimpeached the judgment entered upon them was right, and that the findings could not be questioned upon an appeal; and that the defendants were only entitled to a new trial.

Holl, Q.C., was not heard in reply.

Dec. 13. COCKBURN, C.J. We are agreed that the appeal must be allowed to a certain extent. We think that the plaintiffs are entitled to recover for the breach of contract on the part of the master in not signing a proper bill of lading, but that, on the other hand, the plaintiffs have sustained no real damage, because it is quite clear that the consignees, Messrs. Ybarra & Co., would have been ready to accept the cargo and pay the full freight if the plaintiffs had not written the letter of the 30th of June. I am bound to say that I think the learned judge was wrong (he

(1) 18 C. B. (N.S.) 403; 34 L. J. (C.P.) 146. (2) Law Rep. 9 Ex. 86.
(3) Law Rep. 12 Eq. 378.

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was misled, it was not brought to his attention) in saying that the departure of the vessel without a bill of lading being signed amounted to a conversion. I do not think it did. I think the case is distinguishable from *Peek* v. *Larsen*. (1) This is a most material circumstance in that case that the shipper of the goods, finding he could not get a bill of lading without reference to the terms of the charter, said, "That is not the contract upon which I desired to enter, or upon which I shipped my goods." If, in the present case upon the master refusing to sign such a bill of lading as he ought to have signed, the plaintiffs had said, "Then give us back our cargo, we are not prepared to send the cargo to Spain without a bill of lading," the case might have been very different, and might have come, I do not say it would, within the facts and authority of *Peek* v. *Larsen* (1); but such were not the facts here. The captain was bound to do two things; to take the cargo to its destination, according to the terms of the charterparty, and he was also bound to give a bill of lading in the usual form, and not in the form upon which he insisted; but those are two distinct things, and two separate parts of one general contract. One of the things he was to do under the contract was to take the cargo to Bilbao, and so determine the contract. Without any protest on the part of the plaintiffs, I think it is impossible to say that that amounts to a conversion, the only purpose and intention of taking away the cargo being to fulfil the contract under the charterparty, and to deliver it at Bilbao, the place to which he was to take it according to such directions as the plaintiffs gave.

Then it becomes necessary to see what was done when the goods arrived at Bilbao. It is clear that instead of treating it as a conversion, the plaintiffs would have been willing to treat the goods as their own, and have their contract with Messrs. Ybarra & Co. completed; and to have the opportunity of enforcing the penalties under the charterparty. What was the position of Messrs. Ybarra & Co.? Messrs. Ybarra & Co. were perfectly prepared to take the cargo; I think that is a fact about which there can be no doubt; they were quite willing to take it without the bill of lading, because they were the ultimate vendees of the cargo, and as long as they had their cargo they were willing to pay the freight which they knew

(1) Law Rep. 12 Eq. 378.

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was the freight to be paid. They were in no way prejudiced by not having the bill of lading, and it is clear to my mind that they were ready to take the cargo, and pay what they had agreed to pay, by the terms of their contract to the plaintiffs. The plaintiffs interfere, and they ask Messrs. Ybarra & Co. to abstain from fulfilling their engagement, and not to take the cargo except upon terms of deducting the amount claimed for penalties from the freight. What was the captain's position? Does what he did on the occasion amount to a conversion? I say assuredly not. The captain is bound in duty to his owners to take care that the freight is paid, because the parties claiming were the recipients of the cargo out at Bilbao. By the terms of the charterparty the moment the coke was loaded and conveyed to its destination, the charterers were to be absolved from all further liability, and if the captain had submitted to this deduction for his freight he certainly could not have recovered it from the plaintiffs, nor could he have recovered it from Messrs. Ybarra & Co., consequently it would have been lost to his owners. He was therefore perfectly justified in saying, "I have a right to my freight;" and Messrs. Ybarra & Co. said, "We have received advices from the parties telling us not to pay it." Contends the captain, "I cannot take the cargo back to England; I cannot stay here; all I can do is to land the cargo and warehouse it for whom it may concern. If I cannot get my freight the worse for me and my owners." And he has to warehouse it. Therefore, under the circumstances, it is impossible to say that the plaintiffs did not deal with the cargo in such a manner as to assert their ownership when it got to Bilbao; consequently, if there was any conversion at Cardiff, which I do not think there was, that conversion would be affected by what took place at Bilbao, and, in the second place, it seems to me that there was no conversion on the part of the master at Bilbao, because he only did that which he was fairly entitled to do, namely, to refuse to part with the cargo until he got his full freight paid.

There was no conversion, but there is a case of a breach of contract, though not a breach of contract upon which the plaintiffs could have established any real substantial damage, because they had the matter in their own hands, and if they had not insisted

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upon the deduction of the penalty, the cargo would have been delivered to the consignees, and the consignees would have paid the freight and the amount for the cargo, and no persons would have been damnified. I think, therefore, that there should be nominal damages to the amount of one shilling, leaving each party to pay their own costs, as they are both in the wrong.

BRAMWELL, L.J. I entirely agree. First, I desire to say a few words as to our jurisdiction. If, upon the materials before the learned judge, he has, in giving judgment, come to an erroneous conclusion upon certain questions of fact, and we see that the conclusions are erroneous, we must come to a different conclusion, and act upon the conclusion that we come to and not accept his finding. I have not the slightest doubt such is our power and duty. A great difference exists between a finding by the judge and a finding by the jury. Where the jury find the facts, the Court cannot be substituted for them, because the parties have agreed that the facts shall be decided by a jury; but where the judge finds the facts, there the Court of Appeal has the same jurisdiction that he has, and can find the facts whichever way they like. I have no doubt, therefore, that is our jurisdiction, our power, and our duty: and if, upon these materials, judgment ought to be given in any particular way different from that in which Lindley, J., has given it, we ought to give that judgment.

On the main question I do not agree with Lindley, J., that there is a conversion. I do not desire to repeat what my Lord Chief Justice has said, because I entirely concur with him. I wish, however, to make a remark on the case of *Falke* v. *Fletcher*. (1) In this case the goods are put on board the ship, and the ship sails with them and takes them to Bilbao for the purpose of executing the contract, which the defendants had entered into with the charterers. In the case of *Falke* v. *Fletcher* (1) it was different, because what Falke said there, and had a right to say, was, "Give me bills of lading, so that I shall have the control of my goods." But the defendant there said, "No, it is De Mattos's salt, and I shall take it to De Mattos and deliver it to him; I will not give you bills of lading, and recognise your property in the goods."

(1) 18 C. B. (N.S.) 403; 34 S. J. (C.P.) 146.

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The cases, therefore, are entirely different. Suppose this was a contract on the part of the defendants, by which the plaintiffs might treat the sailing away from Cardiff as a conversion if they think fit to do so. They do not think fit to do so, because, when the vessel arrives at Bilbao, their consignees, persons acting under their direction, treat these goods as goods which are to be delivered to them, and they actually take delivery of thirty tons. I put that as a criterion. If the defendants had converted the cargo to their own use, whose property are the thirty tons that were delivered? Have they been re-converted to the use of Messrs. Ybarra & Co., or the plaintiffs? It cannot be said that they have. I think there was no conversion, therefore, under the circumstances.

I also wish to say a few words as to the penalties. The plaintiffs have argued that under this charterparty the penalties are still going on, and I suppose will go on to the end of time, because, certainly, I cannot think the plaintiffs are bound to accept a bill of lading now, and I do not see when they are to stop. Where there is a terminus a quo and a terminus ad quem, there the penalties may accrue due. Take the case of a building contract; the terminus a quo is the time mentioned in the contract, and the other terminus is when the building is finished; but in this case you have no such two termini, because here you cannot name any time which is the end of the period during which this 10*l.* a day is to accrue. The penalties only accrue where there has been a delivery of bills of lading after a delay, and they do not accrue where there has been an entire refusal to give any bill of lading. The penalty clause does not apply, but one reason might be that there is no basis upon which the amount of penalty can be measured; therefore I think the clause does not apply.

I ought to have said that there was no conversion out at Bilbao by the captain, because the plaintiffs' agents, Messrs. Ybarra & Co., only asked for these goods upon terms upon which they were not entitled to have them, and if the defendants' captain had some motive in his mind other than the right one, that does not vitiate his title, or make him less entitled to retain the goods under his true right to do so; and where a man is insisting upon two reasons, one of which is a right one, and the other of which

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is a wrong one—although I do not say that he insisted upon the wrong one here—the other party cannot say "because he has given a wrong reason he shall not have the benefit of the right one."

I have one further remark to make. I agree with my Lord Chief Justice that the captain was bound to sign a bill of lading. That means a bill of lading in the ordinary form, and not a bill of lading different from the ordinary forms, unless there is some special cause for his doing it, and there was none such here. He had no right to put in the stipulation, "The vessel not liable for duties on cargo caused by non-arrival before 1st July." It has been said that it was a nugatory stipulation for him to put in. Possibly it was, but a man has no right to put in a stipulation which is unusual, which may create difficulties and embarrassments, and which begs the question in his own favour, and then say, "There is no harm in it, therefore you ought not to object." In my opinion, the defendants' captain refused to sign the bill of lading that he ought to have signed, and therefore committed a breach of the contract. I cannot, however, trace any damage to the breach of contract on the part of the captain. The damages therefore must be nominal—I suppose a shilling; and as both parties are in the wrong, each party must bear his own costs of all proceedings in the action.

COTTON, L.J. I agree in the opinion that Bramwell, L.J., has expressed as to our jurisdiction.

I cannot but think that the argument on this point was founded on the fact, that there was a separate motion for a new trial, in addition to the appeal. We not long ago held that in such a case as this it was only necessary to appeal (1), and the cases already decided (2) merely came to this result, that where there had been either issues settled before the case was heard by the judge without a jury, or where the judge himself had had a thorough adjudication of the facts, and then a separate determination of the law applied to those facts, it was necessary to move within twenty-one days for a new trial, but where there was no such separate adjudication either on the issues beforehand, or a separate adjudi-

(1) *Potter* v. *Cotton*, ~~ante~~, p. 137.

(2) *Krehl* v. *Burrell*, 10 Ch. D. 420; *Lowe* v. *Lowe*, 10 Ch. D. 432.

cation on the facts before the adjudication on the point of law, there only an appeal would lie. But when the appeal comes before us the Court of Appeal has the full right, if it thinks necessary, although there is no motion for a new trial, to say that the conclusion of fact arrived at is not satisfactory, and as they have not the materials before them to arrive at a proper conclusion, the Court will order a new trial, and I can instance a case where this would be done; where the question turns on the credibility of witnesses who had been heard vivâ voce, and seen by the judge who himself had tried the case. In such a case, even although the Court had thought the conclusion was not a correct one, they might direct that the case should go back for a new trial. Here the case is not one which turns on the amount of credibility to be given to the different witnesses, but on the conclusion of fact from certain letters, and from certain evidence which was taken upon commission. Under those circumstances, it is our duty to deal with the matter, and if we see before us the materials for arriving at a conclusion on the facts contrary to that which was arrived at by the learned judge, we ought not, in my opinion, to put the parties to the expense and delay of sending the matter back for a new trial. It is argued that such a course is hard as compared with the right of the suitor to a new trial who has had all his facts tried by a jury; but then the party who has insisted upon his right to a trial by jury, has that right which he cannot be deprived of by the Court. In the present case the plaintiffs by not requiring a jury, have submitted to the matter being tried by a judge, and afterwards by the judges of the Court of Appeal: they have waived their right, which the other party had not, to have the facts tried by a jury. Of course I need not say in all questions of fact, especially where there has been vivâ voce evidence before the judge in the Court below, the Court of Appeal ought to be most unwilling to interfere with the conclusion which the judge has arrived at when he has had the opportunity, which the Court have not, of seeing the witnesses, and judging of their demeanour. Fortunately in this case I cannot find that there were any, and certainly there were no separate issues of fact, or any separate determinations of fact to be tried. In the judgment of Lindley, J., there is no finding contrary to that

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which we have arrived at on the evidence. He draws a different conclusion, but I nowhere find in his judgment that he has found as a fact that Messrs. Ybarra & Co. were willing to pay full freight for the cargo delivered, and nowhere do I find that the master would have refused to deliver the cargo on tender to him of the freight without deductions. I have arrived at the conclusion that in consequence of the acts of the plaintiffs, Messrs. Ybarra & Co. were not ready to pay, except after making a deduction which the plaintiffs had requested them to make for the freight. In my opinion the master was perfectly right to refuse to deliver the cargo unless the freight was paid in full.

One word upon the question of conversion of the cargo. As I agree with the Lord Chief Justice, I will not discuss the case at great length. A contract was entered into to carry a cargo of coke to Bilbao. There is also in the contract a stipulation to give a bill of lading. The master wrongfully refused to give a bill of lading: he had the cargo on board under the contract to carry, and the refusal to give a bill of lading is said to amount to a conversion. The plaintiffs having given the master this particular cargo, did not object to his taking it to Bilbao to Messrs. Ybarra & Co., but objected to the master not giving a bill of lading; Messrs. Ybarra & Co. were perfectly ready to receive this cargo, subject to certain questions as to deduction. That, in my opinion, cannot be considered in any way a conversion.

The cargo was not taken to a person whom the plaintiffs did not intend to have it, as in the case of *Falke* v. *Fletcher* (1); nor was the document of title given to a person other than the plaintiffs so as to enable that other person to get the cargo, as in the case of *Hiort* v. *Bott*. (2) The present was merely the case of sailing away with the coke under a contract to a person who was intended to have it, without giving to the plaintiffs that which I agree the master was bound to give under the contract, and which might have been of use to the plaintiffs in dealing with the coke, but it was not a carrying it away to give it to a person against the will of the plaintiffs, or to give to some one else the means of obtaining the coke against the bill of lading. In my opinion there was no conversion in sailing away with the coke.

(1) 18 C. B. (N.S.) 403; 34 L. J. (C.P.) 146. (2) Law Rep. 9 Ex. 86.

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THESIGER, L.J. I agree with Bramwell, and Cotton, L.JJ., as to the mode in which a case of this kind ought to shape itself before this Court. There may no doubt be cases in which a judge, trying an action by himself, without a jury, may deal with specific questions of fact in such a way that the finding upon those specific questions of fact may be separated from the judgment that he gives upon it. It appears that Order XL. in the latter part of rule 4 contemplates such a case, but, on the other hand, where a judge takes upon himself not to decide any specific question of fact separately, there the matter appears to be one of mixed fact and law, to be dealt with by this Court as it would have been before the old Court of Appeal in Chancery under similar circumstances upon appeal from a Vice-Chancellor. It appears to me that, with one exception, there was no necessity in a case of this kind for any motion for a new trial. That one exception relates to motions upon the ground of surprise. There I think it would be proper that a motion for a new trial should be made, although upon that motion it would be open to this Court not to send back the case to the judge who tried it, but, it might itself, instead of doing that, take the additional evidence, and so try the whole case.

With reference to the merits of this particular case, the Lord Chief Justice has so fully dealt with the facts and the law that, agreeing, as I do, with all the observations which he has made, I shall add but a very few words of my own.

The matter has to be looked upon with reference to two points, namely, the point of time at which the vessel left Cardiff, the place from which the goods were to be carried; the other point would be the moment at which the vessel left Bilbao, the goods having been deposited for the benefit of those whom it might concern. With reference to Cardiff, and the time at which the vessel left Cardiff, the matter appears to me to stand thus. I agree with Lindley, J., that there was a breach of the contract under the charterparty by reason of the captain refusing to give a bill of lading, unless in the bill of lading there was a clause which he was anxious to put upon the charterers; but, although I am of that opinion, I am equally of opinion that there was no conversion at Cardiff.

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Three cases have been cited as bearing upon this question, and those three cases appear to me to be excellent illustrations of what a conversion is, and also excellent illustrations that in this particular case there was no conversion.

The first was *Falke* v. *Fletcher*. (1) There there was a question with reference to certain goods that had been put on board a vessel, whether those goods belonged to the plaintiff, who had actually put the goods on board, or to a person named De Mattos, who had become bankrupt after the goods had been put on board: and it was held in fact and in law that the property in the goods remained in the plaintiff. On the other hand it was proved as matter of fact that, although the goods belonged to the plaintiff, and although he had demanded to have a bill of lading made out which would make the goods deliverable to him or to his order, the captain, having wrongfully asserted the title of De Mattos, refused to give a bill of lading, and carried away the goods. There, therefore, the act of the captain was held to be a conversion, not merely because he refused to give a bill of lading, but because he carried away the goods under such circumstances as shewed that he intended to assert that the title to them was in De Mattos and not in the plaintiff. No circumstances, therefore, could be clearer to indicate that there was a wrongful conversion, and that the action of trover was maintainable.

The second case was that of *Hiort* v. *Bott*. (2) There the defendant admittedly had no title to certain goods. He was anxious no doubt to do all that would be necessary to put the goods within the dominion of the persons who were really entitled to them, but unfortunately his acts were such as to assert a dominion in himself, because he signed a delivery order, which of course was an assertion of title and of a right to deal with the goods in himself. He indorsed that delivery order over to an agent no doubt for the purpose of appropriating them to the persons who were really entitled, but still the fact of indorsing the delivery order to the agent was that he was purporting to give a document of title to the agent. There the defendant was held to have been guilty of a conversion, he having exercised dominion over the goods.

(1) 18 C. B. (N.S.) 403; 34 L. J. (C.P.) 146. (2) Law Rep. 9 Ex. 86.

11 Jur. N.S. 176

The third case, *Peek* v. *Larsen* (1), was a case where a charterparty containing certain stringent terms had been entered into. A person shipped goods on board a vessel which was subject to the charter, but without any notice of the charter, and it was held there as matter of fact and law that he was not bound in any way by the terms of the charterparty. Under such circumstances, either the captain or the shipowner was bound to carry the goods without their being subject to the charterparty, or, at all events, if he refused to carry the goods except subject to the charterparty, he was bound to return them upon demand. He did neither, and having refused to return them upon demand, and carried the goods away, he was properly held liable as a converter of those goods.

But here under the charterparty the shipowner was bound to carry the goods, when they were loaded, from Cardiff to Bilbao, and, looking at the fact that the goods had been sold by the charterers to Messrs. Ybarra & Co., he was bound to deliver them to them, and the goods were carried in the ship from Cardiff without the smallest intention of appropriating those goods to anybody except the plaintiffs, or to those who held title under the plaintiffs.

The only remaining question is, there being a breach of contract at Cardiff but no conversion, was there a conversion at Bilbao, or, if not, what are the damages which reasonably flow from the wrongful breach of contract at Cardiff? I am clearly of opinion, for the reasons already given, that there was no conversion at Bilbao. I am equally clearly of opinion that there were no damages which were due to the breach of contract, and consequently that the plaintiffs can only recover nominal damages.

It is a question of fact entirely, and I think that there is a certain amount of difficulty in arriving at the true state of facts as they existed at Bilbao, but, drawing the best inference I can from the facts as proved, it appears to me that on the 4th of July the captain was perfectly ready to deliver these goods to Messrs. Ybarra & Co., who had contracted to buy them from the charterers, provided he got the full freight, and that the damage therefore has not flowed from the original breach of contract, but

(1) Law Rep. 12 Eq. 378.

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has flowed from the act of Messrs. Ybarra & Co., that act being, under the advice or under the directions of the charterers themselves, wrongly demanding that there should be a deduction.

COTTON, L.J. I wish to add that a motion for a new trial may be necessary where a party is dissatisfied with the judgment on the ground of surprise.

Judgment for plaintiffs; damages.

Solicitors for plaintiffs: *Popplestone & Beddoe, for Vaughan, Newport, Monmouthshire.*

Solicitors for defendants: *Lyne & Holman.*

Nov. 13.

[IN THE COURT OF APPEAL.]

SWAN *v.* BARBER.

Ship—Bill of Lading—Nominal Freight—Cargo on Ship's Account—Lien of Unpaid Vendor—Contract to pay Sum equivalent to substantial Freight—Evidence.

The plaintiff, being the owner of a ship called the *K.*, loaded her with wheat at P.; as the cargo was taken on the ship's account, freight at the nominal rate of 1*s.* per ton was inserted in the bill of lading, which contained the usual exceptions of perils of the seas. He sold the cargo whilst afloat to H. upon the terms that "freight" should be paid at the rate of 60*s.* per ton. H. sold his interest in the cargo, and it ultimately vested in the defendant, who bought the cargo on the same terms on which it had been sold to H. The *K.* on her arrival was ordered to Y., where she commenced to discharge her cargo: the defendant received it and paid large sums on account. The quantity delivered was less than that mentioned in the bill of lading by about seventy quarters. The plaintiff claimed "freight" at the rate of 60*s.* per ton upon all the cargo delivered; the defendant claimed to deduct 193*l.* on account of short delivery. At the trial the jury were of opinion that the short delivery arose from the excepted perils, and found for the plaintiff for the total sum claimed by him:—

Held, that although the plaintiff might not have a lien as shipowner, the cargo being taken on ship's account, nevertheless he had a lien as unpaid vendor; that from the defendant's conduct a contract by him might be implied to pay freight at the rate of 60*s.* per ton upon all cargo delivered, and that the finding of the jury for the plaintiff was right.

BY the indorsement on the writ of summons the plaintiff claimed 193*l.* 3*s.* 6*d.*, being the balance due on account of "freight on 621 tons, 8 cwt. 1 qr. 22 lbs. wheat, ex the *Koh-i-noor*, at 3*l.* per ton," and of "harbour dues on cargo."

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The action came on for trial at the Norfolk Winter Assizes, 1879, before Kelly, C.B., when the following facts were proved:—

The plaintiff was the sole owner of the barque *Koh-i-noor*, and in the month of December, 1876, a cargo of wheat was loaded on board of her at Portland, in Oregon, in the United States, for ship's account. The master signed bills of lading, which stated that the cargo was shipped by Balfour, Guthrie, & Co., of San Francisco, and consisted of 11,200 sacks of wheat "said to contain 1,427,222 lbs.," to be delivered in good order and condition "(all and every the dangers and accidents of the seas and navigation of whatsoever nature or kind excepted) unto order or its assigns: freight for the said goods payable in cash without discount at the rate of one shilling sterling per ton of 2240 lbs. gross weight delivered." On the 26th of April, 1879, during the voyage to England, the plaintiff sold the cargo consisting of about 2854 qrs. to Messrs. Hamilton, of Belfast, as per bill of lading, at the price of 65*s.* per 500 lbs., bill of lading weight, bags included, for cost free on board at place of shipment, including freight and insurance: "freight for United Kingdom to be reckoned at 60*s.* per ton." Messrs. Hamilton sold to Mr. Leigh, of Liverpool, and Mr. Leigh sold to Messrs. Moroney, of London, who were agents for the defendant. Except as to the price per 500 lbs., each contract was in the same terms, namely, that freight was to be reckoned at 60*s.* per ton, the object being to give the ultimate purchaser an extended period for payment of at least 1800*l.* The price of the wheat upon the sale by Mr. Leigh to Messrs. Moroney was 68*s.* per 500 lbs. By the invoice made out from Messrs. Moroney to the defendant it was stated that the price of "2854 $\frac{222}{500}$ qrs. at 68*s.* per 500 lbs." was 9705*l.* 2*s.* 2*d.*, "less freight on 637 tons 3 cwt. 0 qr. 6 lbs. at 60*s.* U.K., 1911*l.* 9*s.* 2*d.*," the balance of 7793*l.* 13*s.* being due on the 7th of July, 1877. The bill of lading and policy of insurance were handed to the defendant. During the voyage to England the *Koh-i-noor* met with bad weather, which caused her to labour and strain and become leaky: the water consequently got to the cargo. On her arrival at Falmouth she was ordered to Yarmouth to discharge. Upon reaching that port on the 16th of May, 1877, part of the cargo was delivered into lighters in the Roads and the residue in

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the harbour. A good deal of the cargo was damaged by sea-water owing to the bad weather which the ship had experienced, and other portions of it were heated: many of the bags containing the wheat were rotten from the effects of the sea-water, and in the result, although all the cargo taken into the ship, except what had been pumped up during the voyage, was delivered to the defendant, there was a short delivery of several tons, if the amount mentioned in the bill of lading was actually put on board. It was ultimately agreed that the weight of the cargo delivered was 621 tons 8 cwt. 1 qr. 22 lbs. Prior to the completion of the discharge two sums of 300*l.* and 1000*l.* had been paid on account of freight, a cheque for the latter sum having been sent by the defendant in a letter, dated the 31st of May, and saying, "We enclose cheque on account of freight per *Koh-i-noor;* please send a stamped receipt for same." After the delivery had been completed, an account was made out claiming "freight on 621 tons 8 cwt. 1 qr. 22 lbs. wheat, at 3*l.* per ton, 1864*l.* 4*s.* 10*d.*," and "harbour dues on cargo, 17*l.* 10*s.* 7*d.*;" these two sums making a total of 1881*l.* 15*s.* 5*d.* Credit was given for the two amounts of 300*l.* and 1000*l.*, and the balance alleged to be due was 581*l.* 15*s.* 5*d.* The defendant at first sent a cheque for 214*l.* 15*s.* 8*d.* in settlement of the claim for the balance of freight: he claimed to deduct the value of "290 sacks wheat short delivered, less freight as per original invoice at 3*l.* per ton," amounting to 193*l.* 3*s.* 6*d.*, and also "half freight on sea-damaged, 115 tons 17 cwt. 1 qr. 27 lbs. at 30*s.* per ton," amounting to 173*l.* 16*s.* 3*d.* The claim to deduct the latter amount was afterwards withdrawn by the defendant, and "full freight" upon the sea-damaged wheat was paid; but as he persisted in his refusal to pay the sum of 193*l.* 3*s.* 6*d.*, the present action was brought. The defendant, upon cross-examination, said: "I agree that the output was 621 tons odd, which equal 2784 qrs.: I was to pay 3*l.* a ton freight on that."

Kelly, C.B., in summing up the case to the jury, said that it seemed from the contract that 2854 qrs. were shipped at Portland, but on the voyage to England part of the cargo had heated, and part had been damaged by sea-water, so that upon discharging the vessel at Yarmouth the cargo was found to consist of only 2784 qrs. instead of 2854 qrs.: that the plaintiff could not recover

freight except for the number of quarters actually delivered, but that he was entitled to recover to that extent unless the defendant could make out a cross-claim to that amount. But by the bill of lading perils of the seas were excepted, and the question for the jury was, did the short delivery arise from the excepted perils? Unless the deficiency was thus caused, the defendant would be entitled to a set-off against the plaintiff; but if it did, the defendant's only remedy was against his underwriters.

The jury found a verdict for the plaintiff for 193*l.* 3*s.* 6*d.*

The Exchequer Division (Kelly, C.B., and Pollock, B.), having refused an application to set aside the verdict, the defendant obtained from this Court a rule nisi on the ground of misdirection.

Bulwer, Q.C., and *W. Graham*, shewed cause. It may be admitted for the plaintiff that much more than the freight mentioned in the bill of lading has been paid by the defendant; but this circumstance really tells very much against him. The plaintiff had, at least, a lien as unpaid vendor; and it is evident from the defendant's conduct that he was endeavouring to induce him to waive it. All the "freight" has been paid except so much as represents the value of the wheat, which the defendant alleges to have been shipped, but which was not delivered; and, upon the question of short delivery, the defendant is concluded by the finding of the jury. It may be true that "the vendor does not comply with his contract by the tender or delivery of either more or less than the exact quantity contracted for:" Benjamin on Sales, bk. 4, part 2, ch. 2, p. 567 (2nd ed.); but this doctrine must be taken subject to the qualification mentioned in a note to the above quoted passage: "The rule is less rigid where goods are ordered from a correspondent, who is an agent for buying them;" for this qualification *Ireland* v. *Livingstone* (1) is cited. In the present case the defendant, the ultimate purchaser, was bound to treat the plaintiff, the original seller, as his agent, and he could only demand that a quantity approaching that mentioned in the bill should be delivered to him. The plaintiff merely claims freight upon the number of quarters actually delivered.

Finlay, in support of the rule. The plaintiff, as shipowner, can

(1) Law Rep. 5 H. L. 395.

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recover only the freight mentioned in the bill of lading: *Keith* v. *Burrows*. (1)

[PER CURIAM: In that case the question was whether the mortgagee of a ship upon taking possession could be in a better position than the mortgagor.]

The plaintiff had no right of action against the defendant; there was no evidence of a contract by the defendant to pay "freight" at the rate of 60*s*. per ton; and if there had been, the defendant would have been entitled to claim against the plaintiff for short delivery. It is immaterial that the defendant might have a remedy against his underwriters.

JESSEL, M.R. When the facts of the case have been fully ascertained, it will be found possible to do substantial justice between the parties. The action was wrongly framed, if it be considered from a technical point of view; but the defect was capable of amendment. The plaintiff being owner of the ship *Koh-i-noor*, loaded her at Portland, in Oregon, with a cargo of wheat. The master signed bills of lading, but the rate of freight therein stated was merely nominal, namely, 1*s*. per ton. The plaintiff sold the cargo while it was still afloat to Hamilton, upon the terms that the freight should be reckoned at 60*s*. per ton; the effect of this contract was that part of the purchase-money should be retained for a time, and should be paid only when the wheat should have been delivered at the port of discharge. The purchaser sold again, but the new purchaser had, in effect, notice of the terms of the original sale, and he sold upon similar terms at least as to the freight to a third purchaser, who is the defendant in this action. Therefore a sum of money was kept in hand to be paid to the original owner of the cargo upon the right delivery thereof. But the plaintiff, as first vendor, had a lien which he was entitled to enforce. The ship was ordered round to Yarmouth; the defendant paid 1000*l*. and invited the master to complete the delivery of the cargo. All the so-called freight has been paid except a small amount, but the weight delivered was less than that mentioned in the bill of lading, and a quarrel arose as to this short delivery. The plaintiff said that the cargo was

(1) 2 App. Cas. 636.

diminished by reason of the escape of wheat from the bags, and that that loss was occasioned by the excepted perils of the seas, and as to this the jury found in favour of the plaintiff. It has been contended before us that the defendant did not contract to pay the so-called freight at the rate of 60*s.* per ton; but in my opinion, from the defendant's conduct a contract by him may be implied to pay freight at that rate for all the cargo capable of being delivered, in consideration that the plaintiff would waive his lien upon it. I think that the finding of the jury was right and ought not to be disturbed.

BRAMWELL. L.J. In this case as there was no contract of affreightment, no freight could be due. The shipowner was the owner of the cargo, he could not contract with himself. I say nothing about the 1*s.*, it is not material to consider it. The plaintiff wished to sell the cargo, and he found a purchaser willing to take it; but then arose the question as to payment of the carriage to England. If the plaintiff had been the owner of the cargo and another person the owner of the ship, it would have been necessary for the plaintiff to pay freight. When a contract is entered into for the carriage of goods by sea, freight is only payable if the cargo does arrive. In order that the plaintiff and the purchaser from him might be put in the position of the seller and buyer of the cargo carried in the vessel of a third person, the purchase-money was divided into two sums; one representing the value of the cargo at the port of shipment, the other the rate of freight if it had been carried in the ship of another owner. One of these sums is paid as the price of the cargo, the other remains in hand as if it represented a real freight. It is manifest to me that another shipowner would have a lien as to that sum, which would be due to him as a payment of freight; and in point of law no freight is due to the plaintiff, but part of the purchase-money which is to be taken in place of freight is due to him. I think that there was evidence of a short delivery, but it is not necessary to decide this, because the counsel for the plaintiff admitted it. The defendant bought the cargo afloat, and it is his misfortune that there is a deficiency. The policy of insurance was handed to him so that his remedy is against the underwriters. The plaintiff had

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a lien for the unpaid balance of the price against the purchaser from him, and he has the same right against the defendant as sub-vendee. The plaintiff would have a right to retain the goods until payment, and he did not lose that right because the purchaser has sold the goods. The plaintiff being in the position of an unpaid vendor can maintain the action upon a contract, that he should give up his lien and that the defendant should pay the balance of the price due for the goods delivered. The plaintiff is entitled to recover. It is not necessary to refer to any authority, and I need only remark that *Keith* v. *Burrows* (1) is not in point against the plaintiff.

BRETT, L.J. I am of the same opinion. The intermediate contracts had nothing to do with the plaintiff who had sold to Hamilton, and the question is what was Hamilton's liability? The purchase-money was divided into the price at the port of shipment and that which is called in mercantile language freight; it was not "freight," in the strict sense of the word, but it was a quasi freight. The plaintiff, having the cargo on board his ship, had a lien for the unpaid balance against Hamilton; it was a lien as unpaid vendor, not as shipowner. The defendant, however, had notice of it, and took delivery of the cargo; his conduct is conclusive evidence of a contract by him that he would pay the balance due upon the wheat delivered in consideration of the plaintiff waiving his lien. A contract of that kind is often entered into and is well known to the law. It is true that this is not a case of real freight, but only of quasi freight; the difference, however, seems to me immaterial.

Rule discharged.

Solicitors for plaintiff: *Storey & Cowland, for Charles Diver, Great Yarmouth.*

Solicitor for defendant: *George Lockyer, for W. R. Archer, Lowestoft.*

(1) 2 App. Cas. 636.

[IN THE COURT OF APPEAL.]

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Dec. 3.

POTTER *v.* COTTON AND OTHERS.

Practice—Appeal—Trial by Judge without a Jury—Motion for New Trial.

Where an action has been tried by a judge without a jury, if the unsuccessful party is dissatisfied with the judgment either on the ground that the judge has misdirected himself as to the law, or that his findings as to the facts are against the weight of evidence, the proper mode of obtaining relief is by appeal to the Court of Appeal, and not by motion for a new trial.

Krehl v. *Burrell* (10 Ch. D. 420) commented on.

ACTION commenced on the 9th of January, 1877, to recover possession of four houses.

In 1864, the defendant Cotton was the freeholder of some land situate at Fulham, Middlesex, and in April in that year he agreed with Davis to grant building leases of houses to be erected on it. In December, 1865, Davis, with the consent of Cotton, assigned to Harvey the benefit of the agreement. The agreement contained a clause empowering the defendant Cotton to re-enter for non-payment of rent, or upon non-performance of the agreement, or upon failure to erect the intended houses. By certain indentures of lease, dated December, 1865, the four houses sought to be recovered in the action, which had been erected on the land, were demised by the defendant to Harvey for the term of eighty years. The leases also reserved to the defendant Cotton a power to re-enter for non-payment of rent, and for breach of the covenants therein contained. In January, 1867, Harvey mortgaged the four houses to the plaintiff to secure the sum of 1000*l.* and interest: the mortgage debt was never paid off. In 1873, the defendant Cotton caused a writ of ejectment to be issued out of the Court of Queen's Bench against Harvey to recover possession of the piece of land mentioned in the agreement for building leases of April, 1864. Harvey did not appear, and judgment was signed, and possession given to Cotton. The alleged grounds for the ejectment were non-payment of rent and a breach of the covenant to repair.

The action was tried before Huddleston, B., without a jury, and the learned judge was of opinion that the judgment in the action

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of ejectment was conclusive against Harvey, and all persons claiming through him, and that the plaintiff was a privy in estate to Harvey. He therefore gave judgment for the defendants.

Bompas, Q.C. (*Nasmith*, with him), moved for a new trial on the ground that the finding of the judge was against the weight of evidence, upon the ground of misdirection, and upon the further ground that upon the foregoing facts judgment ought to have been entered for the plaintiff.

BRAMWELL, L.J. I am clearly of opinion that in this case the plaintiff ought to have appealed. The reasoning in *Krehl* v. *Burrell* (1) may seem to shew that the motion for a new trial is right: I cannot, however, agree with the judgment in that case: at all events the decision must be confined to cases, where at the trial of the action the facts are found separately, and judgment is reserved and is pronounced at a subsequent time. I wish to point out that a judge gives judgment, he does not give a verdict.

BRETT, L.J. Perhaps we are not at liberty to differ from *Krehl* v. *Burrell* (1); but that case is explained by *Lowe* v. *Lowe* (2), and it merely lays down this proposition that where, according to agreement, a judge finds facts and then reserves judgment, his finding upon the facts is an interlocutory proceeding, and can be questioned only by an application to the Court of Appeal made within twenty-one days. In my own view where a judge has tried an action without a jury, he is in the same position as a Vice-Chancellor was before the Supreme Court of Judicature Acts, 1873, 1875, and the party, who is dissatisfied with his judgment, and is desirous of disputing it, must apply to this Court by way of appeal. It is not necessary now to determine whether that appeal must be brought within twenty-one days or one year.

COTTON, L.J. In this case the ground of complaint is that the judge has wrongly dealt with the evidence. I think that except those cases where the circumstances are identical with those in *Krehl* v. *Burrell* (1), the party dissatisfied with a judgment pronounced after a trial without a jury, must dispute it by way of

(1) 10 Ch. D. 420. (2) 10 Ch. D. 432.

appeal and not by motion for a new trial. *Krehl* v. *Burrell* (1), as explained in *Lowe* v. *Lowe* (2), must be confined to those cases where there has been a separate trial of the issues of fact, and a separate decision of points of law: the issues of fact need not be formal. But the principle of that case is not to be extended to cases where the judge at the same time finds the facts in dispute between the parties, and applies the law to the facts found by him.

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Motion refused.

Solicitors for plaintiff: *Sympson, Warner, & Turner.*

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1880 *March* 23.

Revenue—Succession Duty—Predecessor—Succession Duty Act, 1853 (16 & 17 *Vict. c.* 51), *s.* 2.

A lunatic was tenant in tail in possession of land with remainder to his younger brother R., and his sister D. successively in tail. R. converted his estate tail into a base fee in remainder, and mortgaged his interest to secure debts of 124,000*l.* with a covenant to convey the fee simple to the mortgagees if he should become able to do so. The mortgage debt was more than the fee simple value of the land, and R. had no beneficial interest in the equity of redemption. For the benefit of all parties a compromise was entered into with the consent of the Lord Chancellor (as protector and in lieu of the lunatic under 3 & 4 Wm. 4, c. 74, s. 33), in pursuance of which R. and D. and the mortgagees all joined in deeds of settlement whereby they conveyed the land, subject to the estate tail of the lunatic but discharged from the mortgage, to trustees upon trust after the determination of the lunatic's estate to raise 37,000*l.* by sale or mortgage of the land and to pay that sum to the mortgagees, and subject thereto to hold the land to the use of D. for life with remainder to her sons successively in tail. This arrangement was carried out, and upon the death of the lunatic D. became tenant for life in possession, and upon her death the defendant, as her son, became tenant in tail in possession:—

Held, that the defendant derived his interest as successor from his mother D. and not from his uncle R., as predecessor, under the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 2, and was therefore liable to duty at 1*l.* per cent. and not at 3*l.* per cent.

Affirmed on appeal (10 Ch. D. 191).

THIS was an information claiming succession duty, of which the material parts were as follows:—

By indentures of lease and re-lease, dated the 30th of Sep-

(1) 10 Ch. D. 420. (2) 10 Ch. D. 432.

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tember and the 1st of October, 1800, the Llantarnam Abbey estate was conveyed to trustees to the use of Edward Blewitt for life, with remainder to the use of his first and other sons successively in tail male with remainder to the use of his daughters as tenants in common in tail. Edward Blewitt died on the 1st of March, 1832, leaving two sons, Edward Francis, the elder, and Reginald James, and one daughter, Frances Mary Ann. Edward Francis thereupon entered into possession of the estate, but in April, 1832, was by inquisition found a lunatic. By indentures of lease and re-lease of the 15th and 16th of May, 1834, duly enrolled pursuant to the Fines and Recoveries Act, Reginald James granted and re-leased the Llantarnam Abbey estate to a trustee to hold the same, subject to the estate in tail male of Edward Francis, to the common uses to bar dower in favour of Reginald James his heirs and assigns. In June, 1834, Frances Mary Ann married Richard Brinsley Dowling, and by an indenture dated the 13th of June, 1834, in contemplation of the marriage, she and her future husband covenanted to settle any real estate which she or he in her right should, during the marriage, acquire, to her separate use for her life, and after her decease to her husband's use for life, with remainder to the use of the first and other sons of the marriage successively in tail male. The defendant was the only son of that marriage. Reginald James became indebted to the Monmouthshire and Glamorganshire Banking Company, hereinafter called the bank, in 124,000*l.*, which he secured to the bank by mortgage of his interest in the Llantarnam Abbey estate, with a covenant to convey the fee simple absolute if and when he was able to do so. (1) In 1852 the bank was, under an order of the Master of the Rolls, wound up and official managers appointed. In May, 1855, an agreement in writing was made between the official managers, Reginald James, and Frances Mary Ann Dowling and her husband, whereby—after reciting among other things that Lord Brougham in 1834 (see *In re Blewitt* (2)) and Lord Lyndhurst in 1835, had respectively refused their consent to petitions by Reginald James to enlarge his base fee into a fee simple absolute, and that it was considered

(1) This covenant was not stated in the information, but its existence was admitted by counsel on the argument.

(2) 3 My. & K. 250.

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doubtful whether the estate tail in remainder of F. M. A. Dowling was bound by the covenant to settle after-acquired property contained in her marriage settlement—it was agreed that the parties to the agreement should all join in conveying the estate to trustees for an estate in fee simple absolute, subject only to the estate in tail male of Edward Francis, the lunatic, but freed and discharged from the securities of the official managers upon trust after the decease of the lunatic, in case he should die without leaving issue male, to raise 35,000*l.* and pay the same to the official managers, and subject thereto to settle the estate upon the trusts of F. M. A. Dowling's marriage settlement. In November, 1855, a petition was presented by Reginald to the Lord Chancellor as protector of the settlement and in lieu of the lunatic, to consent to a disposition of the estate upon the terms of the above agreement. The case is reported: *In re Blewitt.* (1) Under an order dated the 26th of February, 1856, made by the Lord Chancellor Cranworth and the Lords Justices sitting in Lunacy, their Lordships consented to Reginald James barring his estate tail and the remainders over for the purpose of enabling the estate to be settled to the uses and upon the trusts of the two deeds next mentioned, dated the 29th of February, 1856.

By one of them made between, 1, the official managers of the bank, 2, Reginald James, 3, Frances Mary Ann Dowling and her husband, and, 4, certain trustees, and duly acknowledged by F. M. A. Dowling and enrolled pursuant to the Fines and Recoveries Act, it was witnessed that—in pursuance of the order of the 26th of February, 1856, and to the intent that the base fee in remainder acquired by Reginald James by the deeds of the 15th and 16th of May, 1834, might be enlarged into an estate or estates in fee simple absolute, subject only to the estate or estates in tail male of Edward Francis (the lunatic), and that every estate tail or in tail male of Reginald James and F. M. A. Dowling and her husband in her right respectively, and all remainders, reversions, estates, and interests to take effect after the determination or in defeasance of the base fee or the estate tail or in tail male of Reginald James and F. M. A. Dowling and her husband in her right respectively, might be absolutely barred and extinguished—

(1) 6 D. M. & G. 187.

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the parties of 1, 2, and 3, with the consent of the Lord Chancellor and Lords Justices, conveyed to the trustees the Llantarnam Abbey Estate for an estate in fee simple absolute, subject only to the estate in tail male of Edward Francis, but freed and absolutely discharged from the securities of the bank, and from all right or equity of redemption of Reginald James, upon trust after the determination of the estate in tail male of Edward Francis either by his death without issue male living at his decease or by failure of issue male within twenty-one years after his death, by sale or mortgage of the hereditaments or any part thereof to raise 37,000*l.* and interest and certain costs, and to stand possessed of the same when raised upon trust for the official managers of the bank, and subject thereto to convey the estate to the uses declared by an indenture of even date.

By an indenture of even date, being the indenture last referred to, made between 1, the official managers of the bank, 2, Reginald James, 3, F. M. A. Dowling and her husband, 4, and 5, certain trustees, it was declared that the trustees of the 4th part should stand seised of the hereditaments subject to the estate in tail male of Edward Francis, and to the raising of the 37,000*l.* and interest and costs, upon trust to convey the same or such parts as should not have been absolutely sold under the trusts of the last stated indenture, and subject to any incumbrances which might have been created thereunder, to the trustees of the 5th part upon trust during the life of F. M. A. Dowling for her separate use, with remainder to the use of her husband during his life, with remainder to the use of the sons of F. M. A. Dowling by R. B. Dowling successively in tail male, with remainder to the use of the daughters in tail, with remainder to the use of F. M. A. Dowling in fee.

Edward Francis died in 1868 unmarried, and F. M. A. Dowling then entered into possession of the estate. The 37,000*l.* were duly raised by the trustees and paid to the official managers. R. B. Dowling died in 1859, and F. M. A. Dowling died in 1875, whereupon the defendant, as her eldest son, entered into possession of the Llantarnam Abbey estate.

The information prayed a declaration that the defendant was chargeable with duty at 3*l.* per cent. as on a succession derived

from his uncle Reginald James, as predecessor, or with duty at some other rate.

The answer of the defendant alleged that the fee simple of the estate was not in 1855, and (as the defendant believed) was not now worth the amount charged by Reginald James on his base fee in remainder expectant on the determination of the estate tail of Edward Francis, and Reginald James had not then any beneficial interest in the estate, and that the real nature of the compromise entered into in 1855 was that the defendant's mother, F. M. A. Dowling, purchased the estate for money or money's worth from the official managers, as mortgagees of Reginald James, and settled it in pursuance of her marriage settlement; that the defendant derived his succession from his mother as his predecessor, and not from his uncle Reginald James; and that he had offered to pay duty at 1*l.* per cent. accordingly.

March 8. *Sir H. Giffard, S.G.*, and *W. W. Karslake*, for the Crown. The real settlor was Reginald. At the moment before the execution of the deeds of the 29th of February, 1856, he had an equity of redemption in his base fee, and he had also a power given him by s. 19 of the Fines and Recoveries Acts, 3 & 4 Wm. 4, c. 74, of converting his base fee into a fee simple absolute. That power could not be exercised during the life of Edward Francis, the lunatic, without the Lord Chancellor's consent, but if the lunatic died without issue, Reginald could have converted the base fee into a fee simple absolute without any one's consent. In *re Blewitt* (1) the Court treated the settlement as one made by him. Mrs. Dowling and her husband were made parties because of the doubt which had arisen whether her estate tail in remainder was included in her marriage settlement, and if she had any interest after the determination of Reginald's estate, it was, as a matter of conveyancing, thought right that she and her husband should convey. They executed the deed as conveying as well as receiving parties, but the settlement would have been equally good if they had not been parties. Defendant's estate came out of his uncle Reginald's estate, and not out of any estate which his mother had. The very point has been determined in favour of

(1) 6 D. M. & G. 187.

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the Crown in *Lord Advocate* v. *Earl of Glasgow*. (1) The Lord Chancellor, as protector of the settlement, was no doubt influenced in giving his consent by the fact that Mrs. Dowling assented, but that is not enough to make her the predecessor. In *Attorney General* v. *Lord Braybrooke* (2), Lord Chancellor Campbell held that the protector of a settlement giving his consent to a disposition of property cannot be treated as a creator of such disposition.

Southgate, Q.C., and *Jason Smith*, for the defendant. The "predecessor" under s. 2 of the Succession Duty Act (3), is the settlor. Mrs. Dowling, the defendant's mother, was the settlor: she provided the 37,000*l.*, and was in fact the purchaser for the benefit of all entitled under her marriage settlement. The ultimate trusts in fee are in favour of her, and no one ever heard of the ultimate trusts in fee being in favour of any one but the settlor. If the lunatic had survived Reginald, and died without issue, Mrs. Dowling would have succeeded to the estate without paying anything, and that contingency she gave up by consenting to this settlement. Without her assent the Lord Chancellor would never have consented. The true principles of construing the Act are clearly laid down in the judgment of Jessel, M.R., in *Fryer* v. *Morland* (4), where he cites *In re Jenkinson* (5) and *Attorney General* v. *Baker* (6), and shews that the object of the Act is "to grant a duty on successions to property by persons succeeding to estates by gratuitous title," and that a person who

(1) 12 Scottish Law Reporter, 215, 217, 218.

(2) 9 H. L. C. 150.

(3) Sect. 2 of the Succession Duty Act, 1853 (16 & 17 Vict. c. 51): "Every past or future disposition of property by reason whereof any person has or shall become beneficially entitled to any property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a 'succession'; and the term 'successor' shall denote the person so entitled; and the term 'predecessor' shall denote settlor, disponer, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived."

(4) 3 Ch. D. 675, 681–684.

(5) 24 Beav. 64.

(6) 4 H. & N. 19.

bonâ fide purchases for money the estate of some one else, derives his interest not from the vendor but from his own money with which he buys.

Sir H. Giffard, S.G., in reply. *Fryer* v. *Morland* (1) would be in point if the Crown were claiming duty on the 37,000*l.* If this was a bonâ fide purchase by Mrs. Dowling, no doubt the defendant's contention would be right, but the 37,000*l.* was raised upon the estate. The covenants for title were entered into by Reginald, and not by Mrs. Dowling.

Cur. adv. vult.

March 23. The following judgments were delivered:—

KELLY, C.B. I am of opinion that the defendant is entitled to the judgment of the Court, on the ground that he claims under his mother, Mrs. Frances Mary Ann Dowling, who became entitled to the Llantarnam Abbey estate, not under any settlement by Reginald James Blewitt, or any other person, but under a purchase from the managers of the Monmouthshire Company, who had purchased the whole estate of Reginald; the purchase having been effected in consideration of the sum of 37,000*l.*, which, with the consent of Mrs. Dowling, was raised upon the estate; the result of which was, that the estate in reversion upon the determination of the estate tail of the lunatic, by his death without issue, passed to Mrs. Dowling, charged with the sum of 37,000*l.*, which, as it is said, has since been paid by her, or the defendant, or, if not paid, which must be paid by the defendant, as the purchase money of the conveyance of the estate to Mrs. Dowling. And although Reginald Blewitt was of necessity a party to the deeds under which this conveyance was effected, he had no interest in the estate, and could not, therefore, settle it upon the Dowlings, or any other person or persons, he having parted with his interest to the Monmouthshire Company, who afterwards conveyed to the managers who became the parties, and the only parties, conveying, and having power to convey the estate to the Dowlings, and to whom the purchase money of 37,000*l.* has been or must be paid by the Dowlings, under and according to the terms of the conveyance.

(1) 3 Ch. D. 675.

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To prove that such is the real nature and effect of the deeds of the 29th of February, 1856, it is necessary to consider only the real condition of the several parties to those deeds, and their respective interests in the estate. First: Reginald Blewitt, at the time of the execution of the deeds, had ceased to possess any interest whatsoever in the estate. He had, before, converted it into a base fee, but he had mortgaged the property to the Monmouthshire Company, from whom it had passed to the managers, for 124,000*l.*; and if the estate had been dealt with immediately before the execution of the deeds, it must have been sold, and upon the sale the purchase money received by the managers of the Monmouthshire Company, unless it had produced more than 124,000*l.* But, immediately upon the execution of the deeds of the 29th of February, 1856, the estate passed, subject to the death without issue of Francis, the lunatic, and subject to the charge of 37,000*l.*, and certain expenses incurred in raising that sum, for life to Mrs. Dowling, with remainder to Richard Brinsley Dowling, the present defendant. This appears clearly and indubitably from the provisions of the deed (par. 24), by which the several parties to the deed, with the consent of the Lord Chancellor and Lords Justices, conveyed the estate to the trustees and their heirs in fee simple, subject only to the estate tail in Edward Francis Blewitt, "but freed and absolutely discharged from the before recited securities of the Monmouthshire Company, *and from all right or equity of redemption of Reginald James Blewitt*:" in trust with all convenient speed after the determination of the estate of the lunatic, by sale or mortgage of the estate to raise 37,000*l.*, and a further sum for certain expenses to be incurred; and then to stand possessed of the sum, when raised, for the benefit of the managers of the Monmouthshire Company, and subject thereto, upon trust to convey, settle, and assure the same estate upon trust, as declared by the other deed (par. 25), that is to say, to Mrs. Dowling for life, to her separate use, with remainder to her sons and daughters in succession in tail male; in other words, to Richard Brinsley Dowling, the present defendant.

What, then, is the substance of this entire transaction? The Monmouthshire Bank, and afterwards the managers who were the mortgagees of the estate for 124,000*l.*, compromised their claim

upon the estate being charged for their benefit with 37,000*l.* Reginald had ceased to possess any interest whatever in the estate; for, first it was mortgaged to the bank for 124,000*l.*, though he still retained the equity of redemption, which it is obvious, however, was valueless. But by the deeds he expressly parted with the equity of redemption, and with all other interest that he had possessed, or could thereafter possess in the estate, in consideration of the bank, and afterwards the managers, releasing him in effect from the large debt of 124,000*l.*, and compromising it for a charge upon the estate of 37,000*l.* He therefore gave up all that he ever had possessed, and all that he ever could possess, by the execution of the deeds. The managers gave up their claim to 124,000*l.*, in consideration of the charge upon the estate of 37,000*l.*, to which they would become, as they have since, in fact, become entitled. And this sum of 37,000*l.*, thus charged upon the estate, and so diminishing its value by that amount, has been paid or must be paid by the Dowlings, into whose possession the estate passed, immediately upon the death of the lunatic without issue. On the other hand, the Dowlings, whose consent to and participation in the arrangement was made the condition by the Lord Chancellor of his authorizing and giving effect to the arrangement at all, gave up their right of succession, under the entail, upon the deaths of the lunatic and of Reginald Blewitt without issue and without having barred the subsequent entails; but they also agreed to take the estate, if they should become entitled to take it at all, under the deeds charged with the debt of 37,000*l.* and upwards, and which, as already observed, the defendant has paid or is liable to pay. All the parties were open to the risk of the lunatic recovering from his insanity, and converting his estate tail into a fee, or marrying and having issue; and to the risk, likewise, of his surviving one, or more, or all of them. It was therefore manifestly to the interest of the bank and managers to agree to the compromise, and execute the deeds, in order to obtain the sum of 37,000*l.*, which, without the consent of the other parties, they must lose altogether. So, it was obviously to the interest of Reginald Blewitt that he should agree to the compromise, in order to be free from a debt of 124,000*l.*, which he had not the chance of being ever able to pay. And

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with respect to the Dowlings, without whose consent the Lord Chancellor never would have sanctioned the compromise at all, they were content to sacrifice upwards of 37,000*l.*, and take the estate subject to a charge to that amount, which, sooner or later, they must pay in order to obtain the estate, as they did obtain it, upon the death of the lunatic. And this compromise, as it affected all the parties to it, was expressly sanctioned and approved by the Lord Chancellor. It is clear, therefore, that the effect of this compromise was not a settlement by Reginald upon the Dowlings, but a purchase by the Dowlings, not of Reginald but of the bank or of the managers, for upwards of 37,000*l.* Being, then, a purchase, and not a purchase of the alleged settlor, but of his vendees, the managers of the bank, by the Dowlings, who have paid the price of upwards of 37,000*l.*, or become liable to pay it, it is not a settlement at all but a purchase for a valuable consideration. And it comes directly within the authority of the case of *Fryer* v. *Morland*. (1) The marginal note is this:—"A conveyance or assignment by way of bonâ fide sale does not create a succession within the meaning of the Succession Duty Act, 16 & 17 Vict. c. 51. Where the purchaser of a reversionary life interest in settled property had contracted to sell it to D., the tenant for life in possession, in consideration of a sum of money paid down and a further sum payable on the death of D., secured by a charge on the reversion—Held, that there was no succession created within the meaning of sect. 2 of the Act, and that no duty would be payable on the death of D. in respect of the said charge."

Upon these grounds I am of opinion that the defendant does not take this estate under a settlement by Reginald Blewitt as a predecessor or otherwise, but that he takes it in succession to his mother, Mrs. Dowling, who took the estate by purchase for a valuable consideration and not of Reginald Blewitt at all, but of the managers of the bank.

HAWKINS, J. The question in this case is, whether the defendant became possessed of the Llantarnam Abbey property on a succession derived from his uncle Reginald Blewitt, or on a

(1) 3 Ch. D. 675.

succession derived from his mother Frances Dowling. In the former event he is liable to the succession duty of three per cent. claimed by the Crown. In the latter to one per cent. only —which sum he is willing to pay.

By the Succession Duty Act (16 & 17 Vict. c. 51), s. 2, it is provided that every "disposition" of property by reason whereof any person has or shall become beneficially entitled to any property upon the death of any person shall be deemed to confer on the person entitled by reason of such disposition "a succession." Did the defendant then succeed to the property upon a "disposition" of his uncle or of his mother?

The material facts are by no means complicated, and for the purposes of the present case it will be sufficient to commence with a settlement of the property by Edward Blewitt, the defendant's grandfather, in the year 1800. By indentures of lease and release dated respectively the 30th of September, and the 1st of October, 1800, Edward Blewitt conveyed the Llantarnam Abbey property to trustees, inter alia, to the use of himself Edward Blewitt for life, with remainders to his first and other sons in tail male, with remainder to his daughters in tail general. Edward Blewitt died in 1832, leaving two sons, Edward Francis Blewitt (a lunatic), and Reginald Blewitt, and a daughter Frances, who afterwards became the wife of Richard Brinsley Dowling, and by him the mother of the defendant. On the death of Edward Blewitt, Edward Francis, his lunatic son, became possessed of the property as tenant for life in tail male. In May, 1834, by indentures of lease and release, Reginald Blewitt conveyed the property to a trustee in fee, to hold the same (subject, inter alia, to the life estate of Edward Francis Blewitt, the lunatic), to the use of himself the said Reginald Blewitt, his heirs and assigns, thus creating in himself a base fee in remainder expectant upon the estate in tail male of his lunatic elder brother.

After May, 1834, Reginald Blewitt mortgaged his base fee to the Monmouthshire and Glamorganshire Banking Company (called hereafter "the bank"), for 124,000*l.*, with a covenant, in the event of his future ability so to do, to convey to them also by way of mortgage the absolute fee simple. The sum for which the property was so mortgaged was in excess of its full fee simple

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value, so that Reginald Blewitt's equity of redemption was valueless. In 1852 the bank was wound up and official managers appointed whom I will still call "the bank." In June, 1834, Frances Blewitt married Richard Brinsley Dowling, having immediately before and in contemplation of such marriage covenanted with trustees to settle any real estate which she in her own right should during the continuance of her marriage acquire, to her own use during her life, with remainder to her intended husband during his life, with remainder to the first and other sons of that marriage in tail male. Reginald Blewitt Dowling, the defendant, may (for the purposes of this case) be treated as the only issue of that marriage.

Before referring to the subsequent arrangements and dispositions of the property in 1855 and 1856, it will be convenient shortly to consider the position of all parties immediately before such arrangements and dispositions were made. The lunatic Edward Francis Blewitt was in possession as tenant for life in tail male. Reginald Blewitt was next in succession, but he had so mortgaged his estate in remainder that he had no longer any beneficial interest in it, and was moreover incumbered with a personal liability for 124,000*l*. "The bank" had advanced that sum upon the security of Reginald's interest. If he died in the lifetime of the lunatic without acquiring a fee simple absolute that security would vanish. Frances Dowling (defendant's mother) and her issue were under the settlement of 1800 next in succession to her brother Reginald Blewitt, but their possession of the property was contingent upon the deaths of Edward Francis (the lunatic) and Reginald without male issue, and upon the non-barring of the estate by Reginald. If once Reginald acquired an estate in fee simple absolute, all the hope of Frances Dowling would be at an end, for the bank mortgage would absorb everything.

In this state of uncertainty all parties, save the lunatic whose life estate was unaffected, were naturally anxious for some arrangement by which each might acquire and secure to him or herself some certain definite advantage. First, Reginald to relieve himself from a load of personal debt; secondly, the bank to obtain certain payment of a portion of that which was owing to them in lieu of the very uncertain security they held for the whole of it;

thirdly, Mrs. Dowling to obtain certain and immediate possession (subject to the life estate only of the lunatic) of a property which possibly, in the then existing circumstances, might never become hers at all, though if it did it would no doubt come to her free from the incumbrances which Reginald had endeavoured to heap upon it. To acquire and secure this certainty Mrs. Dowling was willing to allow the fee simple of the property to be absolutely charged with a sum of 37,000*l.* to be paid to the bank. The bank were willing to accept that sum in satisfaction of their claim, and Reginald was willing to make a legal conveyance of his valueless equity of redemption.

By a document in writing dated the 1st of May, 1855, to which the bank, Reginald Blewitt, and Mr. and Mrs. Dowling were parties, an arrangement, in substance such as that I have referred to, was made, but it needed the consent of the Lord Chancellor, who was protector of the existing settlement of 1800 (the tenant for life being a lunatic) before it could be carried into execution. His lordship thought the proposed arrangement reasonable, and gave his assent to it accordingly. The arrangement so approved was carried out by two deeds, each bearing date the 29th of February, 1856. Upon the true effect and construction of these deeds the question before us depends.

By the first of them Reginald Blewitt, Mr. and Mrs. Dowling, with such consent as aforesaid, and the bank, conveyed the Llantarnam Abbey property to trustees for an estate in fee simple absolute, subject to the estate in tail male of the lunatic, discharged of the mortgages of the bank and the equity of redemption of Reginald Blewitt, upon trust, immediately after the determination of the estate of the lunatic, by sale or mortgage of the property to raise 37,000*l.*, and to stand possessed thereof for the benefit of the bank, and subject thereto to convey the estate to the uses and upon the trusts declared by the indenture next mentioned.

By the second of such indentures of the 29th of February, 1856, it was declared that the trustees named in the first indenture should (subject as in that indenture mentioned) stand seised of the said Llantarnam Abbey property to the use of other trustees (named therein) during the life of Mrs. Dowling, upon trust for

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her separate use with remainder to the use of her husband for life, with remainder to the use of the first and every other son of the said Frances and Richard Dowling in tail male, &c. The lunatic Edward Francis Blewitt died in ~~1869~~ without issue. The father of the defendant died in ~~February, 1868,~~ and his mother in 1875, and thereupon he entered into possession of the property. Reginald Blewitt is still living.

Under these circumstances it is that the question arises whether the defendant succeeded to the property upon the disposition of Reginald Blewitt, or of Mrs. Dowling his mother. After carefully considering the matter, and not without hesitation, I have arrived at the conclusion that the defendant derived his succession from his mother, Mrs. Dowling, and not from his uncle Reginald.

It was contended for the Crown that the arrangement of 1856 ought to be treated as a disentailing and re-settlement of the property by Reginald. It was argued, moreover, that the consent of Mrs. Dowling, without which the Lord Chancellor would, as protector of the settlement, have refused his assent, was an immaterial circumstance, for that it in no way operated nor could operate as a disposition of the property by Mrs. Dowling, but that the re-settlement of the property emanated from Reginald, in whom alone was vested (subject to the life estate of the lunatic the mortgages to the bank, and the consent of the Lord Chancellor), the power to make such new disposition. And this is true enough. In *Lord Braybrook's Case* (1) Lord Campbell, L.C., said: "It cannot be argued that a person whose consent is necessary to a disposition of property, makes that disposition." And the language of the consent as set forth in the 22nd paragraph of the information is sufficient to shew that in form the disentailment and conveyance to new uses of the property could only proceed from Reginald Blewitt. He was an essential party to the conveyance to the new uses; so also was the bank to the extent of the interest it had acquired from him. Mrs. Dowling however was no necessary party to that conveyance; her consent, it is true, was required by the Lord Chancellor before he would sanction the barring of the entail, but that consent had no legal operation.

In form, therefore, the conveyance to the new uses was a

(1) 9 H. L. 166.

disposition by Reginald Blewitt and the bank. We have not, however, to deal with the mere form, but the substance and true nature of the transaction. This brings me to consider what I deem, apart from technical language, to be the substantial question in this case, viz., whether the estate which the defendant took upon the death of his mother was in substance and reality purchased by her for good consideration; or whether, to adopt the language of the Master of the Rolls in *Fryer* v. *Morland* (1), he succeeded to it by gratuitous title under a disposition made by his uncle Reginald. I think the true answer is, that the property was purchased by Mrs. Dowling for good consideration, such purchase being carried out by the deeds of 1856. The expression of this opinion naturally gives rise to two inquiries:

First: What were the subject-matters of the purchase? Secondly: What was the consideration given for it by Mrs. Dowling?

To the first, my answer is, the life estate of Reginald Blewitt, the interest of the bank as mortgagees, the release of Reginald Blewitt from an overwhelming personal debt, and the certain possession of an estate which but for the arrangement probably would never have come to her at all, for her possession depended on many contingencies which I have pointed out.

To the second inquiry my reply is, that Mrs. Dowling, who if the property had ever come to her as one of those entitled in remainder under the settlement of 1800, would have been entitled to it as a gratuitous succession free from all incumbrances created by Reginald, and might have altogether ignored the claim of the bank, was content to forego her right in that respect, and consented to saddle the estate, or allow it to be saddled, with an absolute charge of 37,000*l.* as the consideration for the certain acquirement by her of those valuable subject-matters of the purchase to which I have just adverted, and this consent it was which induced the Lord Chancellor to sanction and approve of the deeds under which the defendant has now succeeded to the property. To put it shortly, in substance she agreed to purchase the life estate of her brother Reginald, his equity of redemption, the interests of the bank, her brother's freedom from debt and (subject to the lunatic's life estate) the immediate and certain

(1) 3 Ch. D. at p. 681.

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possession of the property; and as a consideration she agreed to forego any contingent right she might have to possess the property free from incumbrances; and consented that it should be absolutely charged in fee with a sum of 37,000*l.* This consent, it must be observed, might very well be a valuable consideration for a contract of purchase though of no operation whatever as an actual disposition of the property.

I think this case falls directly within the principle upon which the Master of the Rolls acted in the case of *Fryer* v. *Morland* (1), upon which the defendant relied in the argument before us. In substance the transaction amounted to a purchase by Mrs. Dowling and an alienation by Reginald Blewitt of the fee simple (subject to the estate of the lunatic) for valuable consideration, and the conveyance to the uses mentioned in the deed of the 29th of February, 1856, must be looked at as though she, having purchased the fee simple, had directed it to be conveyed at once and direct by the vendor to the uses declared, instead of going through the form of first taking a conveyance to herself and then settling it as it was settled by the deed of the 29th of February, 1856.

For these reasons, I am of opinion that the defendant took upon a succession from his mother Mrs. Dowling, and not from his uncle Reginald Blewitt, and that he is entitled to our judgment.

Judgment for the defendant.

Solicitor for the Crown: *Solicitor of Inland Revenue.*
Solicitors for defendant: *R. S. Taylor & Son.*

(1) 3 Ch. D. 675.

WILSON AND ANOTHER *v.* WALLANI AND OTHERS. 1880

March 2.

Bankruptcy—Leaseholds vest in Trustee on Appointment—Disclaimer—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 17, 23, 24—*General Rules*, 1871, *r.* 28.

Under the Bankruptcy Act, 1869, ss. 17, 23, 24, the leaseholds of a liquidating debtor vest in the trustee on his appointment, subject to his power of disclaimer; and if there is no valid disclaimer the trustee is personally liable for the rent accruing due after his appointment and on the covenants of the lease.

A disclaimer in writing signed by the trustee's solicitor is not a valid disclaimer "by writing under the hand" of the trustee within s. 23.

Per Stephen, J.

THE action came on for trial before Stephen, J., and a jury in Middlesex, when the jury were discharged and the questions left to the learned judge, and the case was heard on further consideration in December, 1879. The facts and arguments appear in the judgment.

H. Matthews, Q.C., and *Horne Payne*, for the plaintiffs.

Ambrose, Q.C., and *E. G. Man*, for the bankrupt's trustees, defendants.

March 2, 1880. The following judgment was delivered by

STEPHEN, J. This was an action brought by the landlords of a house, No. 32, Alfred Place, Bedford Square, against Wallani, who was the tenant under an agreement dated the 25th of December, 1876; against various persons to whom Wallani had sublet, and who need not be mentioned; and against Auguste Dumert and Cæsar Demaux, who were the trustees of Wallani under proceedings in the Court of Bankruptcy, by which it was determined that Wallani's affairs should be arranged by liquidation. The action was brought to recover the possession of the house, arrears of rent, damages for non-repair, and damages for use and occupation.

At the trial it was arranged that possession of the house should be given up to the plaintiffs, that 40*l.* should be agreed upon as the damages in respect of want of repair, and that I should decide on further consideration whether Wallani or his trustees were

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liable upon the covenant to repair or for the rent, under the following circumstances:—

On the 23rd of December, 1876, the plaintiffs let the house to Wallani for three years, with covenants to repair and against subletting, and a proviso for re-entry. On the 18th of February 1878, Wallani's affairs were in liquidation and a resolution was passed appointing Dumert and Demaux his trustees. On the 5th of March, 1878, the trustees (who had previously put a man named Boden in possession of the house) sent a cheque for 22*l.* 10*s.* to the plaintiff's agent in payment of a quarter's rent left unpaid by Wallani, but due at Christmas, 1877. In the course of the month of March, 1878, a sale was, by consent of the plaintiffs, held on the premises by the trustees. The rent due on the 25th of March, 1878, was also paid by the trustees, but no rent has since that date been paid. Wallani continued to live in the house and sublet parts of it to various persons subsequently to March, 1878. There was no evidence that after the payment of the Lady Day rent the trustees interfered with the house in any way whatever. On the 1st of November, 1878, the plaintiffs issued a writ against Wallani and his subtenants, but not against the trustees. On the 12th of December, 1878, the plaintiffs' solicitor wrote a letter to the solicitor to the trustees, in which he said: "My object in writing is to ask you to elect on behalf of your clients, whether you will disclaim the lease, otherwise I must apply at chambers to add you as defendants:" and on the 20th of December he repeated the question in another letter. On the 24th of December Mr. Swaine, the solicitor for the trustees, wrote to the plaintiffs' solicitor the following letter:—

"Dear Sir,—Re Wallani,—I have seen my clients on this matter. I was under the impression that the debtor had made arrangements with his landlord for the purpose of continuing as tenant.

"My clients did, I believe, disclaim the lease of 32, Alfred Place, but if I am mistaken, please accept this as such on their behalf.—Yours faithfully,

"C. A. Swaine."

On the 28th of December two letters, signed in the name of the plaintiffs' solicitor by his clerk, were addressed, one to Mr.

Dumert, one of the trustees, saying, "I am in receipt of your letter of the 24th inst., for which I am obliged;" the other to Mr. Swaine, saying, "I am in receipt of your letter disclaiming lease of No. 32, Alfred Place, Bedford Square, on behalf of the trustees of the above-named debtor."

On the 2nd of January, 1879, the plaintiffs' solicitor called the defendants' solicitor's attention to Rule 28 of 1871, and said that the leave of the Court to disclaim their interest in the lease was necessary. Further correspondence on the subject took place, which it is unnecessary to refer to specifically. The result was, that the application for leave to disclaim was made on behalf of the trustees on the 27th of January, 1879, and was refused by the Court on the 18th of February, 1879. Under these circumstances the question is whether Dumert and Demaux or Wallani are liable upon the covenants of the lease down to the date when the writ was issued, and to mesne profits down to the time when possession was given up by Wallani.

The argument presented on the part of the plaintiffs was that the lease with all liabilities under it was vested absolutely in the trustees by the Bankruptcy Act, 1869, s. 17, subject to their power to disclaim, and that they had not disclaimed in the manner directed by the statute, and so continued liable. The argument on the part of the defendants was, that upon the true construction of the Bankruptcy Act, 1869, the trustees were not liable unless they had elected to take the lease, that they had not so elected, and that even if they had it was not open to the plaintiffs to say so on the pleadings. The plaintiffs alleged in reply that if an election was necessary the conduct of the trustees amounted to an election to take the lease, and that that point was open to the plaintiffs on the pleadings.

Wallani (who appeared in person at the trial) did not appear when the case came on for further consideration.

I now proceed to consider these arguments.

The first question is whether the Bankruptcy Act of 1869 vests the bankrupt's leasehold properties in the trustee absolutely subject to his right of disclaimer, or whether it is necessary that the trustee should elect to take the lease in order that he may become liable to the burden of the covenants. This question has never,

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I think, been decided, and in order to solve it it is necessary to compare together the provisions of the present and those of the earlier Bankruptcy Acts and to consider the cases decided upon them.

Under the different Acts relating to bankruptcy down to and including 6 Geo. 4, c. 16, the commissioners appointed by the Lord Chancellor were authorized to seize the property of the bankrupt and assign it to assignees for the benefit of the creditors. It was held by a series of authorities, of which *Copeland* v. *Stephens* (1) is perhaps the most distinct and elaborate, that an assignment made in general terms did not vest the bankrupt's leaseholds absolutely in the assignees, but left in them a power to renounce them if it was for the interest of the creditors that they should be renounced. It should be observed, however, that in that case Lord Ellenborough is careful to limit his language to the particular matter before him, which he does in these words: "The judgment of the Court in this case is founded upon its own special and peculiar facts; viz., a general assignment under a commission of bankruptcy, not accompanied or followed by notice of the existence of the term nor by any act of acceptance, entry, or possession." It must also be observed that the judgment proceeds throughout upon an inquiry into the question as to what is required in order to vest a term of years in an assignee of the term. Subsequent legislation has altered the whole scheme of the law of bankruptcy.

By 1 & 2 Will. 4, c. 56, which first established a Court of Bankruptcy, it was enacted (s. 25) that when any person was adjudged a bankrupt "all his personal estate and effects present and future which by the laws now in force may be assigned by commissioners, acting in the execution of a commission, against such bankrupt shall become absolutely vested in and transferred to the assignees or assignee for the time being by virtue of their appointment without any deed of assignment for that purpose, as fully to all intents and purposes as if such estate and effects were assigned by deed to such assignees and the survivor of them."

By the Bankruptcy Act of 1849 (12 & 13 Vict. c. 106, s. 141) this provision was re-enacted in substance, but all reference to

(1) 1 B. & A. 593, 607.

commissions of bankruptcy and to deeds of assignment was omitted. The operative words of the section are, "All his personal estate . . . shall become absolutely vested in the assignees . . . by virtue of their appointment." Upon the earlier Act it might perhaps have been said that the assignees were put in the same position by their appointment as they would have been put in by the execution of the deed of assignment, but not in the position in which they would have been placed by acting under it. The terms of the Act of 1849 do not leave room for this interpretation. The words vest the bankrupt's leaseholds absolutely in the trustees "by virtue of their appointment," though s. 145 of the Act recognizes rather than creates the necessity of an election by the trustees. This view of the matter was taken by Vice-Chancellor Stuart in *Cartwright* v. *Glover* (1), in which it was decided that the assignees of a bankrupt, who allowed the bankrupt to remain in possession of leasehold property and to pay the rent to the lessor, could make a good title to a purchaser although they had done nothing amounting to an election to accept the lease. In his judgment on this case the Vice-Chancellor says, "Nothing can be more clear than that the state of things upon which the whole decision in *Copeland* v. *Stephens* (2) proceeded, viz., that nothing vested until the power was exercised, is no longer applicable to the right of those who claim by assignment under assignees in bankruptcy," and he goes on to treat of the sections which deal with the right of election on the part of the assignees in bankruptcy as a sort of equivalent for the right to refuse burdensome property which they had been held to possess, without any express enactment, under the earlier system. This decision, therefore, seems to be an authority for the proposition that under the Bankruptcy Act of 1849 a bankrupt's leaseholds vested absolutely in his assignee, subject to the provisions of that Act as to the assignee's power of election.

The Act of 1869, 32 & 33 Vict. c. 71, s. 17, contains the following provision: "Upon adjudication the property of the bankrupt shall vest in the registrar. On the appointment of a trustee the property shall forthwith pass to and vest in the trustee appointed." So far, therefore, as the vesting of the property in the trustee is concerned,

(1) 2 Giff. 620, 626. (2) 1 B. & A. 593.

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the language of the Act of 1869 is as strong as that of 1849, and is entirely different from that of the Acts consolidated in 1824, upon which *Copeland* v. *Stephens* (1) and other cases were decided. Upon the whole it appears clear that the effect of the provisions contained in the Acts of 1849 and 1869 is to vest the bankrupt's leaseholds in the trustees absolutely, subject to the provisions contained in those Acts as to election and disclaimer.

The second question is whether, taking into account the provisions of s. 23 of the Act of 1869, this vesting makes the trustees personally liable upon the covenants of the lease. In order to answer this question it is necessary to compare the provisions of the Acts of 1849 and 1869, and to consider the cases which have been decided upon the Act of 1869.

First, I will compare the two statutes. Each provides for three possible cases—the case of the assignee or trustee taking the land, the case of his declining to take, and the case of his abstaining from either course. Neither statute states explicitly the full consequences of either of these three courses of action. Each leaves much to be implied. First, as to the Act of 1849. Sect. 145 of that Act provides that if the assignee elects to take the lease the bankrupt is to be free from the burden of the covenants, that if the assignee declines the lease the bankrupt shall be able to free himself from the covenants by delivering up the lease to the lessor within fourteen days after notice that the assignees have declined, and that if the assignee makes no election on being required to do so the lessor shall be at liberty to apply to the Court for an order that he shall elect, whereupon the Court may order the assignee to elect or make such other order as may seem right. The election to take the lease might be made by conduct, and especially by taking possession and doing acts of ownership, and various cases arose as to what amounted to a taking possession or exercising an act of ownership. The effect of all this was that the question whether the bankrupt was or was not to continue liable to the lessor depended on the course taken by the trustees, and that the position of the lessor depended upon the construction to be put upon the conduct of the trustees, a matter which might raise questions of considerable difficulty.

(1) 1 B. & A. 593.

The Act of 1869 contains an entirely different set of provisions, the object of which seems to me to be to give the landlord the means of ascertaining for himself whether the trustees mean to take to the lease or not; and to enable the trustees, on the other hand, to get rid of onerous property, although they may have done acts which would have amounted to an election to take it under the Act of 1849. Sect. 23 effects these objects by providing that the trustee may disclaim by writing under his hand any burdensome property, "notwithstanding he has endeavoured to sell or has taken possession of such property or exercised any act of ownership in relation thereto;" but by s. 24 this right ceases if the trustee declines or neglects to give notice whether he disclaims or not for twenty-eight days after an application in writing to make such a statement has been made to him by some person interested in the property. The Act contains no explicit provision as to the bankrupt being freed from his liability by the trustee's acceptance of his lease, or as to his being able to free himself from it by surrendering his lease. Neither does it contain any explicit provision as to the liability which is imposed upon the trustee either in the case of his disclaiming or in the case of his not disclaiming the lease. It is therefore necessary to consider what consequences follow apart from any such express provision.

This matter has been discussed to some extent in the two cases of *In re Sneezum, Ex parte Davis* (1) and *Ex parte Dressler, In re Solomon* (2), and though neither of these cases is precisely in point, the two together throw much light on the subject. In the case of *In re Sneezum* (1) the bankrupt's trustees had carried on a contract into which the bankrupt had entered. After being called upon to say whether they disclaimed it or not they returned no answer, but continued to carry it on so long as they found it profitable. When they ceased to do so they ceased to perform it, and the Court of Appeal held, confirming the Chief Judge in Bankruptcy and the county court judge, that they were not liable either personally or on behalf of the estate. It will be found on examining the judgments of the Lords Justices that the case decides that s. 23 does not mean that if the trustees fail to disclaim a contract they thereby impliedly adopt the contract, but

(1) 3 Ch. D. 463. (2 9 Ch. D. 252.

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that its effect when taken in connection with other parts of the Act is that if the trustees do disclaim a contract it is to be determined from the date of the adjudication, and that if they do not disclaim they may carry it on as long as they please and discontinue it when they think proper, the other party being at liberty to prove against the estate as for a debt for any loss which he may sustain by their conduct. This decision proceeds upon the principle that the Act of 1869 leaves the earlier law unaltered, except in those cases in which the alteration is made by express words. The earlier law as to a bankrupt's contracts was that the bankrupt continued to be liable upon his contracts notwithstanding his bankruptcy, but his assignees might perform them in his place if they pleased, and as long as they pleased. The express words of s. 31 of the Act of 1869 take away the bankrupt's liability, but the power of the assignees not being taken away by express words, and not being absolutely inconsistent with the provisions as to disclaiming, remains unaltered.

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In *Ex parte Dressler* (1) the trustee took possession of a bankrupt's lease, and when called upon to disclaim omitted to do so, and it was held that he became personally liable to pay the rent. The judges who decided the case took the same view as to the effect of the Act of 1869 as was taken in *In re Sneezum*. (2) They thought that the earlier law was unaltered except so far as the express words of the statute altered it. But the earlier law was that a trustee who took possession of the bankrupt's lease became personally liable upon the covenants. He therefore continued to be so.

Each of these cases proceeds on the principle that the scope of s. 23 is not to be extended by implication, and that the trustee is to have the same rights and liabilities as the assignees had before him, unless they are altered by express words.

The question, therefore, in the present case is whether the Act of 1869 contains any express words whereby the necessity for the election of the trustees to take a lease as a condition precedent to their liability on its covenants is taken away. The examination of the history of the law given in the earlier part of this judgment seems to me to supply the answer. I think that under the

(1) 9 Ch. D. 252. (2) 3 Ch. D. 463.

first set of bankruptcy laws—those which were consolidated in 1824—the power of the trustees to renounce onerous leases arose from the absence of any legal enactment vesting such leases in them, and from the insufficiency for that purpose (as explained in *Copeland* v. *Stephens* (1)) of a general assignment. Under the second set of bankruptcy laws, including the Act of 1849, the property was actually vested in them, but a power to elect whether they would take it or not was confirmed by the express words of s. 145 of the Act of 1849. This Act was repealed by 32 & 33 Vict. c. 83. Under the third system established by the Act of 1869, the leases of the bankrupt are vested absolutely in the trustee, subject to his right of disclaimer, but no power of election is given to him or recognized in him. It thus appears to me that the power of election conferred by the Act of 1849 being repealed by express words, and the estate being vested in the trustee by the express words of the Act of 1869, he has no power to get rid of it, except by following the express words of s. 23. I do not think this view is inconsistent with the cases to which I have referred. They shew only that the provisions of the Act of 1869 are not to be extended by implication. I do not intend to do so by this judgment. I think that the position of the trustee has been altered by express words, though not by words which expressly state all the consequences of the alteration. Upon the whole I hold that the lease was vested in the trustees on their appointment, and that they are personally liable upon the covenants, unless they make a valid disclaimer. I think *Ex parte Dressler* (2) is an express authority as to their personal liability, assuming the lease to be vested in them absolutely.

Did they, then, make such a disclaimer as is required by s. 23; that is, did they, or either of them, "by writing under his hand," disclaim such property? It was alleged in argument that the letter of the 24th of December signed by the solicitor to the trustees was such a writing, but I am of opinion that it was not. It is not under the hand of either of the trustees, even if it were absolute in its terms, as to which I think there may be a doubt. Several cases were quoted on the subject, the one most relied upon by the counsel for the defendant being *Reg.* v. *Justices of*

(1) 1 B. & A. 593. (2) 9 Ch. D. 252.

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Kent (1), in which case a notice of appeal required by statute to be "in writing signed by the person giving the same or his attorney," was held to be sufficient when it was signed in the name of the person giving the notice by his attorney's clerk in his presence. In that case, as I understand the report, the attorney's clerk wrote the name of Weld, the appellant, by Weld's authority. In the present case he wrote his own name. I think that to hold this sufficient would be to modify the language of s. 23, by reading for "under his hand," "under his hand or under the hand of his agent."

It was also argued that the letter of the 28th of December, from the plaintiff's solicitor, saying, "I am in receipt of your letter disclaiming lease of No. 32, Alfred Place, on behalf of the trustees of the above-named bankruptcy," was a waiver of the lessor's right to a more formal disclaimer, and *In re Stokoe* (2) was referred to upon this subject. I do not myself think that the letter was more than an acknowledgment of the receipt of the other letter, with a reference to its contents by way of identification. The case of *In re Stokoe* (2) shews only that this was a matter which might be, and which I suppose was, taken into consideration when the question of extending the time for disclaiming was before the Court.

Upon these grounds there will be judgment for the plaintiffs for 85*l.* (45*l.* for rent, and 40*l.* for repairs) and costs. I do not think the plaintiffs are entitled to recover anything for mesne profits, as the trustees were not in possession of the house after the lease was determined by issuing the writ.

The view which I take of the case makes it unnecessary for me to consider the other questions raised.

Judgment for the plaintiffs.

Solicitor for plaintiffs: *C. F. Yorke.*
Solicitor for defendants: *C. A. Swaine.*

(1) Law Rep. 8 Q. B. 305. (2) 2 Ch. D. 802.

[See *Reed* v. *Harvey*, 5 Q. B. D. 185.]

[IN THE COURT OF APPEAL.]

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March 19.

LEWIS *v.* LEONARD AND ANOTHER.

Bankruptcy—Bankruptcy Act, 1876, *ss.* 49, 125—*Certificate of Discharge—Proceedings for Liquidation by Arrangement.*

The defendants filed a petition for liquidation by arrangement or composition under the Bankruptcy Act, 1869, and at the first meeting of creditors a resolution was passed that the defendants' discharge might be granted on a certificate of the committee of inspection and trustee to that effect. At a subsequent meeting of creditors, for the purpose of considering a scheme for the settlement of the defendants' affairs, it was resolved that the whole estate should be sold to one of the defendants in consideration of his paying a dividend of 8*s.* in the pound secured by four promissory notes payable at successive dates. The certificate of discharge was granted. The plaintiff was a creditor and proved on the estate to the full amount of his debt. Three of the promissory notes were paid to all the creditors including the plaintiff, but default was made in payment of the fourth :—

Held, first, that the certificate of discharge was by force of the Bankruptcy Act, 1869, ss. 49 and 125, conclusive evidence of the validity of the proceedings under the liquidation, and that the discharge was valid. Secondly, that the plaintiff having received and retained a dividend could not be heard to object to the resolutions.

ACTION by indorsee against acceptors on two bills of exchange, one for 50*l.* at four months' date, and the other for 100*l.* at six months' date.

At the trial before Grove, J., without a jury, at the Spring Assizes for Warwickshire, the following facts were proved. The defendants, who carried on the business of oil and colour merchants and drysalters at Birmingham, on the 29th of November, 1877, filed in the county court of Warwickshire holden at Birmingham, a petition for liquidation of their affairs by arrangement or composition under the Bankruptcy Act, 1869. At the first general meeting of creditors, held on the 28th of December, 1877, resolutions were duly passed "that the affairs of the defendants should be liquidated by arrangement and not in bankruptcy: that C. T. Starkey be appointed trustee with a committee of inspection: and that the debtors' discharge might be granted on a certificate of the committee of inspection and trustee to that effect." The plaintiff was present at this meeting and proved on the estate of

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the defendants for the full amount of his debt, 150*l.* These resolutions were duly registered.

On the 18th of January, 1878, a general meeting of the creditors of the defendants was duly convened and held for the purpose of considering a scheme for the settlement of the affairs of the defendants, and at such meeting the following resolutions were duly passed: "That the trustee with the approval of the committee of inspection (which has already been given) do sell the whole of the interest of the creditors and trustee in the joint estate of the debtors and in the separate estate of J. H. Leonard to S. Leonard alone, in consideration of his paying the whole of the legal charges of the petition, and also a sum sufficient to produce a dividend of 8*s.* in the pound on the debts due to the creditors. Such purchase-money to be payable by the separate promissory notes of S. Leonard in favour of the creditors by four equal instalments at two, four, six, and eight calendar months from the approval by the Court of the terms of that scheme; the payment of the promissory notes to be secured by the bond of the trustee of S. Leonard and of eight sureties." "The trustee to retain possession of the estate until the terms are carried out, and the Court to approve of the terms of the scheme, and then to give the debtors their discharge."

All the terms of the scheme were duly carried out, and on the 12th of February, 1878, the scheme was duly approved by the Court. The trustee under the liquidation having certified and reported to the registrar of the court that the defendants were entitled to receive their discharge, he, on the 1st of March, 1878, granted the defendants their discharge pursuant to the statute. Four promissory notes for 15*l.* each at two, four, six, and eight months' date were sent to the plaintiff and retained by him, the first three of which were duly paid, but default was made in the payment of the last.

On these facts the learned judge decided that the certificate of discharge was a good answer to the action, and directed judgment to be entered for the defendants.

The plaintiff appealed.

Nov. 15, 1879. *De Gex, Q.C.*, and *Dugdale*, for the plaintiff.

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The discharge given to the defendants is not a valid discharge. It must be borne in mind that the proceedings are for a liquidation by arrangement of the bankrupt's affairs, and not for an adjudication in bankruptcy. Therefore by s. 125, sub-s. 9, the provisions of the Bankruptcy Act, 1869, as to the close of the bankruptcy (s. 47) and the discharge of the bankrupt and the trustee (s. 48) do not apply; but the discharge of the debtor and the trustee must be granted by a special resolution of the creditors passed at a general meeting. Here it would appear that under s. 28 a meeting was called to consider a general scheme of arrangement of the affairs of the bankrupt, and at that meeting the trustee was empowered to grant the bankrupt a discharge; this section applies only to cases in bankruptcy: there was no special meeting called for this purpose under s. 125, sub-s. 9. The creditors are not authorized to delegate the power of granting a certificate of discharge to the trustee: *Ex parte Hope.* (1) No doubt under rule 302, where liquidation by arrangement and not in bankruptcy has been resolved on, the creditors may, at the same meeting at which such resolution is passed, resolve whether the debtor's discharge shall be granted either forthwith or at a date to be specified in the resolutions or subject to any and what conditions. The meaning of the rule is that it may be done at a general meeting by a special resolution, but the second meeting here was not a meeting under rule 302 for it had none of the safeguards provided for by s. 125.

Nov. 17. *Mellor, Q.C.*, and *W. Graham*, for the defendants. The certificate of discharge by force of rule 302 combined with s. 125, sub-ss. 9, 10, is valid. By that rule the discharge may be granted subject to any condition. The plaintiff has accepted the dividend to be paid under the resolutions, and he is now precluded from taking exception to them. If the resolutions were invalid, he ought to have opposed the registration of them. In *Ex parte Hope* (1) the creditors had not only delegated their authority to the trustee, but they had also invested him with a discretion to determine whether the discharge should be granted.

Dugdale, in reply.

Cur. adv. vult.

(1) 9 Ch. D. 398.

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March 19, 1880. The judgment of the Court (Lord Coleridge, C.J., Bramwell and Brett, L.JJ.) was delivered by

BRAMWELL, L.J. I am of opinion that the defendants are entitled to judgment. They have obtained a certificate of discharge. By s. 125, sub-s. 10, that certificate "shall have the same effect as an order of discharge given to a bankrupt." By s. 49 "an order of discharge shall be sufficient evidence of the bankruptcy and of the validity of the proceedings thereon." The words are "sufficient evidence," but there is no doubt that this means "conclusive." The course of any one complaining of such order, or intended order, or the report of the trustee or certificate under s. 125, sub-s. 10, is to apply to be heard against the making of it; or if made, to get it set aside. It cannot remain in existence and be contested, as proposed in this case. But there is another ground on which the defendants are entitled to judgment. The plaintiff indeed opposed the resolution, but has received and retained a dividend. While he retains the benefit the resolutions give him, and which he has accepted, he cannot be heard to deny the validity of those resolutions. The object of ss. 125 and 126 is to bind a dissentient minority by the votes of a specified majority. The legislation is quoad the majority needless. Before this Act, and others similar to it, creditors assenting to an arrangement or composition with a debtor were bound: see *Good* v. *Cheeseman* (1), and especially *Boyd* v. *Hind*, per Williams, J. (2) It was upon this ground I thought the judgment in *Campbell* v. *Im Thurn* (3) proceeded. Lord Blackburn, however, in *Breslauer* v. *Brown* (4) says "such a supposition is absolutely contrary to the fact," viz., that the creditors agree to a composition among themselves. He does not think that a creditor who comes in and votes for such a composition dreams that he is entering into a bargain, and adds what is certainly true, that if he votes against it, he makes no bargain. Such expressions do not alter my view of the grounds on which *Campbell* v. *Im Thurn* (3) was in my opinion decided, and rightly decided. But it is not necessary to determine this difference of opinion, for Lord Blackburn proceeds

(1) 2 B. & Ad. 328.
(2) 1 H. & N. 938, at p. 947.
(3) 1 C. P. D. 267.
(4) 3 App. Cas. 672, at p. 705.

to say: "In either case, i.e., whether he has voted for or against the resolutions," he has waived the conditions, and submitted to the Court of Bankruptcy. I do not understand this. If it means he submitted by compulsion, it is incorrect; if it means he submitted by agreement, it looks like a bargain. However, this also is immaterial. They got right somehow it seems in *Campbell* v. *Im Thurn.* (1) And according to this opinion of Lord Blackburn, or according to the one which I thought decided *Campbell* v. *Im Thurn* (1), the creditor is bound if he votes on or assents to the proceedings; à fortiori must he be if he takes a benefit under them as here. It is said he could not help himself. That is not so. He could. He might have refused the dividend, and taken the proceedings he is now taking. I repeat it is impossible he can retain the money he has received, and yet deny the validity of the proceedings under which he has received it. To do so would be contrary to all analogy and to principle. It is unnecessary to discuss the other matters controverted before us.

Judgment affirmed.

Solicitors for plaintiff: *Robinson, Preston, & Stow, for Rowlands, Bagnall, & Co., Birmingham.*

Solicitors for defendants: *Byrne & Lucas.*

(1) 1 C. P. D. 267.

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March 19.

[IN THE COURT OF APPEAL.]

LOWREY *v.* BARKER & SONS.

Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 23, 24—*Lease—Disclaimer—Liability of Trustee—Implied Contract of Tenancy by Use and Occupation —Trespass.*

A trustee in bankruptcy upon disclaimer of a lease granted to the bankrupt does not become personally liable to the lessor, either upon an implied contract of tenancy, or as a trespasser, in respect of the period between the time when his actual occupation ceases, and the date when the disclaimer is executed.

Quære (per Cockburn, C.J., and Thesiger, L.J.) whether upon the execution of the disclaimer all personal liability of the trustee ceases in respect of the period during which he has had an actual occupation of the demised hereditaments.

APPEAL of the defendants from the judgment of Brett, L.J., at the trial.

The facts of the case are sufficiently stated in the judgment of Cotton, L.J.

Dec. 8, 1879. *C. Russell, Q.C.*, and *H. Shield*, for the defendants. At the trial the Lord Justice gave judgment for the plaintiff upon the counter-claim, on the ground that by the disclaimer of the lease the term originally granted to the bankrupts must be deemed to have come to an end at the date of adjudication; it may be admitted that the remedy on the covenants of the lease is gone; but it is contended that the plaintiff, as trustee of the estate, is liable upon an implied contract for use and occupation of the manufacturing premises, for he had the enjoyment of them up to the 20th of May, about which day he disclaimed, and the intervening rights were not annihilated. The authorities are not inconsistent with the argument for the defendants. *In re Sneezum, Ex parte Davis* (1), was a case of a contract, and the liabilities depending upon a contract may be governed by different principles from those regulating the rights of the parties to a lease. *Ex parte Llynvi Coal and Iron Co., In re Hide* (2), merely shews that upon the disclaimer the defendants might have had

(1) 3 Ch. D. 463. (2) Law Rep. 7 Ch. 28.

some claim against the bankrupts' estate. *Ex parte Dressler, In re Solomon* (1), establishes that if a trustee remains in possession of premises after he has been called upon to disclaim, he may become personally liable for the rent, and *Ex parte Brook, In re Roberts* (2), is an authority for the proposition that upon a disclaimer the trustee occupies the same position as if he had never had any estate in the demised property. As the plaintiff has had the beneficial occupation, it is for him to shew that he is not liable to pay the rent: *Ward* v. *Mason* (3), *Harland* v. *Bromley.* (4) By the disclaimer the term does not come to an end for all purposes: *Smyth* v. *North.* (5) Even if the term ended for all purposes by force of the disclaimer, and if no contract can be implied, then the trustee became a trespasser, and he is liable to pay damages to the defendants on account of his wrongful occupation.

A. Wills, Q.C., for the plaintiff. The intention of the legislature was that every facility should be afforded to the trustee, in order to wind up the estate for the benefit of the creditors, and it would be unreasonable to hold that if he occupies any premises leased to the bankrupt, in order to dispose of the property devolving upon him to the best advantage, he thereby incurs a personal liability. Time ought to be allowed to him that he may have a fair opportunity of determining what course he ought to adopt.

H. Shield replied.

Cur. adv. vult.

March 19, 1880. The following judgments were delivered:

COTTON, L.J. (6) The question in this appeal arises on a counter-claim put in by the defendants. The plaintiff is trustee in bankruptcy of the estate of Messrs. Dixon, who became bankrupt on the 8th of October, 1877. At the time of the bankruptcy Messrs. Dixon held certain manufacturing premises as tenants of the defendants under a lease made in March, 1874. The plaintiff, after the bankruptcy, for a time continued to occupy these

(1) 9 Ch. D. 252.
(2) 10 Ch. D. 100.
(3) 9 Price, 291.
(4) 1 Stark. 455.
(5) Law Rep. 7 Ex. 242.
(6) This judgment was read by Thesiger, L.J.

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premises, for the purpose of completing certain work in hand, and while so in occupation did work for the defendants. The plaintiff paid the rent due on the 1st of January, 1878, and after that time he in no way used the demised premises, except that till sometime in January, 1878, he kept there, and in that month sold, certain chattels belonging to the bankrupt's estate. The quarter's rent due on the 1st of April, 1878, was paid, not by the plaintiff but by Messrs. Wilkinson & Kendell, who were creditors of the bankrupts, and entitled by assignment to such interest as the bankrupts had in certain machinery on the premises, which under a covenant in the lease were at the expiration thereof to be paid for by the landlord. Apparently some negotiation was going on between the defendants and Wilkinson & Kendell, with reference either to this machinery or to the lease of the premises, and in the meantime the plaintiff retained the key; but on the 20th of May the negotiations between the defendants and Wilkinson & Kendell having come to an end, the plaintiff, under the provisions of sect. 23 of the Bankruptcy Act, 1869, disclaimed the lease of the premises and gave up the key to the defendants. The plaintiff brought his action for the price of the work done for the defendants, and they by counter-claim sought to recover rent from the 1st of April down to the time that the key was given up by the plaintiff to them. Under sect. 23 of the Bankruptcy Act, 1869, when a disclaimer is given the lease is to be deemed to have been surrendered as on the date of the adjudication, in this case on the 8th of October, 1877; and having regard to the operation of the statute the trustee must be considered as never having had any interest in the lease, and the question is whether or no, notwithstanding that in fact the lease existed down to the 20th of May, and such possession as he had previously to that day was under the lease, he is to be held liable either under an implied contract for use and occupation or as a trespasser? Brett, L.J., before whom the case was heard, decided in favour of the plaintiff against the counter-claim; hence the appeal to us.

I will first deal with the question whether the counter-claim can be sustained under an implied contract by the trustee in bankruptcy to pay for use and occupation of the premises. Such use

and occupation as existed was with reference to, and under, the lease, and though the subsequent disclaimer of the trustee under the statute requires us to treat the lease as if it never existed subsequently to the bankruptcy, yet when in fact the occupation has been with reference to an express existing contract, it is not, in my opinion, right to imply a contract with reference to the occupation which the parties never could have contemplated.

It is a very different question whether the trustee can be treated as a trespasser. In dealing with this part of the case I think we must consider the intention of the enactment which we are considering. Independently of its operation a trustee in bankruptcy, who for the benefit of the estate had for a time occupied premises held on lease by the bankrupt, would be personally liable as tenant, with a right of indemnity against the estate if sufficient for the purpose, and the object of the statute was to relieve the trustee from this personal liability, and the creditors from the loss resulting from his claim for indemnity. Moreover, it does so by treating the lease as surrendered not as from the date of the disclaimer but as from the date of the order of adjudication, which points to an intention entirely to relieve both the trustee and the estate from all liability. The case of *Ex parte Brook* (1) is an authority that certain acts of the trustee between the adjudication and the disclaimer are to be treated as wrongful acts. But in that case the acts of the trustee were the severance of fixtures belonging to the landlord, unless removed during the existence of the lease. Here the act relied upon by the defendants was the formal continuance of possession by retaining the key without any actual use of the premises or dealing with any thing thereon. In my opinion it would not be right, in consequence of the trustee subsequently exercising the power of disclaimer which he had under the Act, even although he has taken possession, to treat these acts as wrongful and tortious, and sufficient to subject the trustee to a claim for damages as a trespasser. The landlord might have protected himself, if he had thought fit, by exercising the power given to him by s. 24 of calling on the trustee to elect whether he would disclaim or not, and if the landlord is in fact

(1) 10 Ch. D. 100.

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injured by what is done, he has, under the latter part of s. 23, a right of proof against the estate of the bankrupt.

BRAMWELL, L.J. I am also of opinion that the judgment should be affirmed. The question is not whether the plaintiff could disclaim when he did. The question is, whether he is liable on a contract to pay for use and occupation. It is an action of contract. There is no express contract, and the question therefore must be whether there is one implied. The only ground for implying such a contract is that otherwise the plaintiff is a trespasser by virtue of the retrospective operation of s. 23. I think that a trespass cannot be turned into a contract in this way. But that is immaterial, because if the plaintiff was a trespasser I think there ought to be an amendment to enable the question in controversy between the parties to be tried. That question is, whether, the lease being to be deemed to be surrendered on the day of the adjudication, the defendants are entitled to a compensation for the plaintiff's occupation of the premises after that period. Is the plaintiff a trespasser, then, by reason of such occupation? I am of opinion he is not. It seems to me impossible to hold that a power of disclaimer given for the benefit of the estate can only be exercised on the terms of its trustee becoming a wrong-doer and trespasser, nor can it be possible to imply a contract to pay for the occupation on a quantum meruit in respect of an occupation which, had there been no disclaimer, would have been as assignee of the lease. As to *Ex parte Brook* (1) it was not necessary there for the trustee to do what he did in order to enable him to decide whether he would take to the lease; the act was not of the character of those so necessary. But more or less of an occupation is necessary for such a purpose, and is contemplated by the statute. If the occupation here was too much, the defendants should have treated the disclaimer as a nullity, and sued the plaintiff as assignee of the lease. It is said to be hard on the lessor. So it is, but it is the hardship of all who deal with those who become bankrupt.

THESIGER, L.J. I agree with Cotton, L.J., in the conclusion

(1) 10 Ch. D. 100.

that the judgment appealed from should be affirmed, and if the reasoning by which that conclusion is arrived at be limited to the circumstances of this particular case I assent to it, for I am of opinion that here there was neither contract by the plaintiff to pay for use and occupation, nor liability on his part as for a trespass in respect to the period to which the counter-claim relates. The actual occupation by the plaintiff, which ceased before the 1st of January, 1878, was treated as an occupation under the lease, and for it as such, payment was made and accepted; and there was no subsequent occupation by him, which could be held to constitute a trespass or to raise the implication of a contract. But I desire to guard myself against being supposed to lay down as a general principle that a trustee in bankruptcy who, after having had actual use and occupation of the bankrupt's leasehold premises, without payment, disclaims the property, is under no personal liability. (1) It seems manifestly unjust that the landlord should be remitted to proof in the bankruptcy, and should thus be a sufferer over and above the other creditors of the bankrupt in respect of damage to him, which even under the powers given to him by s. 24 of the Bankruptcy Act he could not wholly prevent; and which is incurred after the bankruptcy and for the benefit of the general body of creditors. On the other hand, there is no reason, as a matter of justice, why the bankrupt's estate should not indemnify the trustee for what he is called upon to pay in respect of an occupation which he need not and would not have enjoyed except for the purpose of increasing that estate. I see no legal difficulty in the way of implying a contract to pay in a case where the trustee alleges that, notwithstanding the effect of the disclaimer, he is not a wrong-doer and the landlord by not calling upon him to disclaim has in a manner assented to his occupation; while, if such a contract is not to be implied, I do not see why upon the lines of the decision in *Ex parte Brook* (2), and as a further solution of the problem how to adjust rights and liabilties where something is to be deemed to have been done which has not in fact or in law been done, the trustee should not be deemed a trespasser. He has by his own act divested himself of any protection under the lease, he has ex hypothesi no other contractual

(1) See *Wilson* v. *Wallani*, ante, p. 155. (2) 10 Ch. D. 100.

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protection, and the section of the Act of Parliament (s. 23) under which he disclaims, while expressly providing that his disclaimer shall not be invalidated by his having taken possession of the property disclaimed or exercised any act of ownership in relation thereto, which would have been the case under the prior bankruptcy law, contains no provision that the liability of the trustee, which by the general law as well as the prior bankruptcy law such possession or acts of ownership would have entailed, is in every shape and form to cease. The provision at the end of the section, that "any person injured by the operation of the section shall be deemed a creditor of the bankrupt to the extent of such injury, and may accordingly prove the same as a debt under the bankruptcy," may perhaps be intended to include the injury caused to a landlord by the occupation of the premises by the trustee for the period between the date of the adjudication in bankruptcy and that of the disclaimer, and thus inferentially to exclude the liability of the trustee for such occupation; but it is by no means clear to me that it was so intended or ought to be so construed; and I prefer to keep my mind open upon this important question for some occasion when it becomes necessary to decide it.

I have the authority of Cockburn, C.J., to say that he concurs in the judgment which I have just delivered.

Judgment affirmed.

Solicitors for plaintiff: *Hamlin & Grammer.*
Solicitors for defendants: *Nelson, Barr, & Nelson.*

[IN THE COURT OF APPEAL.]

1880
Feb. 26.

HINCHCLIFFE *v.* BARWICK.

Sale of Goods—Sale of specific Chattel—Conditions of Sale—Warranty.

The plaintiff bought a horse by public auction at a repository warranted to be a good worker, subject to the condition that "horses warranted good workers, whether sold by private treaty or public auction, not answering such warranty must be returned before five o'clock of the day after the sale; shall then be tried by a person to be appointed by the auctioneer, and the decision of such person shall be final." The horse was not returned within the stipulated time:—

Held, on demurrer, in an action on the warranty, that the plaintiff's only remedy was under the condition, and that he could not maintain the action.

CLAIM stated that the defendant sold to the plaintiff a certain roan gelding called Dragon at the price of 53*l.* 10*s.*, warranting that the gelding was a good worker, and the plaintiff bought the same from the defendant on the faith of the warranty; that the gelding was not at the time of the sale and is not a good worker.

Defence: That the horse was sold by the defendant to the plaintiff, as being the highest bidder for it at a public auction held at the Royal City Repository, situate at Barbican, in the city of London, subject to certain printed conditions of sale, and amongst them the following condition: "Horses warranted quiet in harness, or quiet to ride, or good workers, or in any other respect (whether sold by private treaty or public auction), not answering such warranty must be returned before five o'clock the day after the sale, shall then be tried by a competent person to be appointed by the proprietors of this establishment, and the decision of such person shall be final; the expenses of trial, viz., 10*s.*, shall be paid by the party in error. Horses returned not answering the warranty will be charged for at the rate of 5 per cent. upon the sum realised at sale." That even if the horse was warranted at the sale to be a good worker, which the defendant denies, the plaintiff did not return the horse before five o'clock the day after the sale in compliance with the conditions.

Demurrer, on the ground that the condition only relates to the return of the horse, and does not debar the purchaser from claiming damages for any breach of warranty.

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On argument of the demurrer the Exchequer Division decided that the statement of defence was an answer to the plaintiff's claim, and overruled the demurrer.

The plaintiff appealed.

D. Seymour, Q.C., and *Bray*, for the plaintiff, in support of the demurrer. The judgment of the Court below is erroneous. The remedy given to the purchaser under the conditions of sale is not a substitutional but an additional remedy. The condition is inserted for the protection of the auctioneer, the defendant; its object is to enable him safely to pay the purchase-money over to the seller; and to secure this protection to the auctioneer, the condition provides for two things, that the horse shall be returned in a certain time; that he shall be examined by a person to be named by him, whose decision shall be final. If the plaintiff does not within the stipulated time return the horse, he is remitted to his original right, and can maintain an action for breach of the warranty. If the action were brought for money had and received the horse must have been returned: *Towers* v. *Barrett* (1); but an action on the warranty may be brought without either the horse being returned or notice given of the unsoundness: *Fielder* v. *Starkin*. (2) There are no words limiting the duration of the warranty, as in *Chapman* v. *Gwyther* (3); *Bywater* v. *Richardson* (4); *Smart* v. *Hyde*. (5)

[They also cited *Head* v. *Tattersall* (6) and *Adam* v. *Richards*. (7)]

Charles, Q.C., and *C. Hall*, for the defendant, contrà, were not heard.

BRAMWELL, L.J. I am of opinion that the judgment of the Exchequer Division is right. The condition set out in the statement of defence is informal. The words are "must be returned," but the condition does not state what are the consequences of not returning the horse. The plaintiff, however, contends that although the horse is not returned he still retains his remedy for a breach of warranty. If a man buy a horse or any other thing

(1) 1 T. R. 133.
(2) 1 H. Bl. 17.
(3) Law Rep. 1 Q. B. 463.
(4) 1 A. & E. 508.
(5) 8 M. & W. 723.
(6) Law Rep. 7 Ex. 7.
(7) 2 H. Bl. 573.

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with a warranty, and the warranty is broken, his only remedy is by bringing an action on the warranty. But here, by the condition, the remedy of the purchaser is to return the horse, and have the matter adjudicated and determined in the manner pointed out; and I can well understand that the provision is a useful one. If there has been any fraud the case is taken out of the contract, and then the purchaser does not rely on the warranty. He can bring his action on the fraudulent representation. The parties, as it were, say let us have no difficulty hereafter with regard to the sale of this horse. I say he is sound, but on this condition, if it should turn out he is not sound he must be returned before five o'clock the next day, and the question must be dealt with according to the printed condition. I think that is a reasonable bargain. The demurrer must be ~~allowed.~~ overruled

BAGGALLAY, L.J. The horse was sold by public auction at a repository; and the condition under which he was sold is an entire condition. If a horse is sold warranted sound or a good worker, and after the sale it appears that he is not sound or is not a good worker, he must be returned within a certain time, tried by a person to be appointed by the auctioneer, and the decision of the person is to be final. It appears to me, therefore, that the object of the condition was to provide a ready mode of ascertaining and deciding between the parties whether there was any breach of the warranty, and that such decision was to be final. I think the judgment of the Exchequer Division right.

THESIGER, L.J. I agree that the judgment of the Exchequer Division is right, and that the demurrer ought not to be allowed. It is well established at law that, where a warranty has been given, the only remedy, if the horse proves unsound, is an action for breach of the warranty. A buyer cannot return the horse unless there is some special bargain between the parties. But at public sales by auction at a repository, sales are made between parties unknown to one another, and it is an object at such sales that the dealings should be carried out in such a way as to ensure as little litigation as possible. The mode in which this object is carried out at all horse repositories is that where a warranty is given, which is not

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complied with, the horse is to be returned within a certain time, he is examined by a competent person, who gives a final decision, and if the horse is found to be unsound the auctioneer takes him back, and the purchaser's money is returned to him. The consequence of this mode of dealing is that few disputes occur. Bearing in mind this practical view of the matter, what have these parties agreed to? The condition is one framed by the auctioneer as the condition on which one man buys and another sells—the buyer and seller stand on equal terms within it. The words are not clear, but they are sufficiently intelligible. They do not say that the horse *may*, but that he *must* be returned within a certain time; he *shall* be tried by a person to be appointed by the auctioneer, whose decision *shall* be final. I think these words mean that the purchaser agrees that the return of the horse in the manner provided for is to be his only remedy. The construction is reasonable, and accords with the practical view of the question.

Judgment affirmed.

Solicitors for plaintiff: *Torr, Janeways, Torr, & Gribble.*
Solicitors for defendant: *Keene & Marsland.*

Feb. 18.

[IN THE COURT OF APPEAL.]

MYERS *v.* DEFRIES AND OTHERS (No. 2).

Practice—Costs—"Event"—Several Causes of Action—Rules of Hilary Term, 1853, *No.* 62—*Rules of the Supreme Court,* 1875, *Order LV., rule* 1.

When in the same action the jury find for the plaintiff with damages as to one cause of action and for the defendant as to other and distinct causes of action, the word "event" in the proviso to Rules of the Supreme Court, 1875, Order LV., rule 1, must be read distributively, and the defendant is entitled to tax his costs of the issues found for him, provided no order otherwise is made by the judge who tried the cause or by the Court.

Judgment of the Exchequer Division (ante, p. 15) affirmed.

APPEAL by the plaintiff from an order of Pollock and Huddleston, B.B., dismissing an application to review the taxation of the defendants' costs.

The facts of the case are stated in the judgment of the Exchequer Division. (1) It will be sufficient here to mention that the plaintiff sued the defendants for malicious proceedings in bankruptcy; for libel and slander; for trespass, and conspiracy. At the second trial, which took place before a jury, the finding was entered for the plaintiff with one farthing damages as to the claim for libel, and for the defendants as to all the other issues. The Exchequer Division held that the defendants were entitled to the costs of the issues found for them. (1) It had been previously ordered by the Exchequer Division and by the Court of Appeal that the plaintiff should have no costs of the action. (2)

Feb. 17, 18. *Murphy, Q.C.*, and *W. H. Clay*, for the plaintiff. First, the "event" of the second trial is in favour of the plaintiff according to Order LV. He has obtained a finding of the jury for some amount of damages, and judgment has been entered for him; whereas the defendants, from the very nature of the case, have recovered nothing. That party wins the event to whom some amount is awarded: *Chatfield* v. *Sedgwick*. (3)

Secondly, if the "event" of the trial is not in favour of the plaintiff, nevertheless it is not wholly in favour of the defendants; for they have failed as to one of the causes of action alleged against them; and it is contended for the plaintiff that in the proviso of Order LV. the word "event" means the whole event, and that in order to entitle a party to the costs he must succeed as to each of the causes of action. The "event" is the result of all the proceedings incidental to the litigation: *Field* v. *Great Northern Ry. Co.* (4) Upon taxation the master followed the practice existing before the Judicature Acts, 1873, 1875. This practice was regulated by the Common Law Procedure Act, 1852, s. 81, and by the Rules of Hilary Term, 1853, No. 62, and pursuant to it the costs of an issue followed the finding thereon. But all provisions as to costs contained in former statutes are now abolished: *Garnett* v. *Bradley* (5); and the rules which governed the apportionment of costs are now no longer in force: *Ex parte*

(1) Ante, p. 15.
(2) 4 Ex. D. 176.
(3) 4 C. P. D. 459.
(4) 3 Ex. D. 261.
(5) 3 App. Cas. 944.

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Mercers' Co. (1) The Court below were of opinion that the old statutes and practice as to costs had been swept away, but they held that the word "event" must be read distributively. This construction is erroneous; the word must be taken to mean "the result of the action," an interpretation supported by the construction which has been put upon the language of orders of reference: for instance, where the costs of the award and of the reference are to abide the event of an award, if the award be partly in favour of one party and partly in favour of the other, though there be a substantial balance in favour of one, each party must bear his own costs: *Gribble* v. *Buchanan.* (2) A similar principle has been followed where the costs of the action and of a reference and award were to abide the event of the award: *Boodle* v. *Davies* (3); and where the costs of an action and of a suit in equity were to abide the award: *Reeves* v. *M'Gregor.* (4) No hardship is inflicted upon the defendants by the construction contended for by the plaintiff; the proper course was to apply to the judge at the trial for their costs, and if they had done so the plaintiff might have shewn good cause why they should not have them. No doubt "issues" are mentioned in Order XXVI. and Order XXXVI., rules 26, 27, and 29; but the issues there mentioned are those which a judge has power to direct, and they are not such "issues" of law or fact as formerly existed. "Issues" in the old sense of the word have ceased to exist, leaving costs to be dealt with at the discretion of the Court or judge. No fair reason can be assigned why the word "event" should be read distributively, and the decision in the Exchequer Division was evidently based upon the supposed hardship of the construction contended for by the plaintiff.

Thirdly, the defendants have estopped themselves from applying for the costs of the issues found in their favour; they have already obtained an order depriving the plaintiff of costs (5); the question of costs was then disposed of. The point in dispute is res judicata, and the plaintiff ought not to be liable to any costs.

Gates, Q.C., and *Edward Pollock*, for the defendants.

(1) 10 Ch. D. 481.
(2) 18 C. B. 691; 26 L. J. (C.P.) 24.
(3) 3 A. & E. 200.
(4) 9 A. & E. 576.
(5) 4 Ex. D. 176.

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[BRAMWELL, L.J. We do not require any argument as to the plaintiff's third contention: it is clearly unsustainable.]

It was intended by the legislature to preserve the practice and principles formerly existing as to the taxation of costs: Rules of the Supreme Court (Costs), No. 28, Special Allowances and General Provisions. The issues must be dealt with distributively. *Blake* v. *Appleyard* (1) relates to a counter-claim; it is nevertheless a strong authority for the defendants. They do not claim the costs of the action, but only the costs of the issues found in their favour; and to these they are without doubt entitled: *Halliman* v. *Price.* (2) Under the former practice of the Court of Chancery, when a bill was partly dismissed but the plaintiff succeeded as to part of his claim, the costs might be apportioned: *Attorney-General* v. *Lord Carington.* (3) It is incorrect to argue that issues are abolished; they still remain. It has been contended for the plaintiff that in the proviso of Order LV. "event" means the whole event; but the judgment in an action in which a claim and a counter-claim are pleaded is but one event, and yet the defendant, if he succeeds as to the counter-claim, is entitled to his costs. In *Saner* v. *Bilton* (4) the plaintiff's claim and the defendant's counter-claim were both dismissed with costs, and it was held that the plaintiff must pay to the defendant the general costs of the action, and that the defendant must pay to the plaintiff only the amount by which the costs had been increased by reason of the counter-claim. It is the defendants who have substantially succeeded at the trial: *Kelcey* v. *Stupples.* (5) No case precisely in point is to be found; but the principle contended for by the defendants is supported by the judgment of this Court in *Berdan* v. *Greenwood.* (6) It appears to be there assumed that issues may be found for each party, and the costs taxed accordingly. *Cole, Marchant, & Co.* v. *Firth and Another* (7) is an authority for the defendants. *Davidson* v. *Gray, Barrow, & Co.* (8) is only to be explained upon the ground that the general finding was erroneous, and that the finding ought to have been entered

(1) 3 Ex. D. 195.
(2) 41 L. T. (N.S.) 627.
(3) 6 Beav. 454, at p. 458.
(4) 11 Ch. D. 416.
(5) 1 H. & C. 576, per Pollock, C.B.
(6) 3 Ex. D. 251, at p. 257.
(7) 40 L. T. (N.S.) 851, at p. 857, per Kelly, C.B.
(8) See note at end of case.

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distributively. The word "event" in the proviso means the result of each separate cause of action.

Murphy, Q.C., in reply. *Saner* v. *Bilton* (1) is not in point, for the proviso in Order LV. relates to trials before a jury; moreover the plaintiff had totally failed to prove his case. It is to be recollected that the judgment in the action, when drawn up, is single, at least in point of form; and upon the judgment the plaintiff appears as the successful party. The costs of issues are created by statute; all statutes as to costs are abolished by the Judicature Acts, 1873, 1875, and the costs of issues are not re-introduced by the proviso in Order LV.

8 App. Cas. 356

BRAMWELL, L.J. I think that the judgment of the Exchequer Division must be affirmed. Order LV. is unfortunate in its language, and it may be expedient to annul it and to substitute in its place provisions expressed in clearer terms. The difficulty of construing the order is increased by the circumstance, that most probably a case like the present was not contemplated by those who framed it. Independently of the decision of the House of Lords in *Garnett* v. *Bradley* (2), I quite agree that the old law as to costs is gone; but we may look upon it as a guide, for the former rules as to apportioning the liability for costs were in themselves reasonable and ought to be followed wherever it is practicable. It has been contended by the counsel for the plaintiff that the proviso in Order LV. applies only where the result of the trial is wholly in favour of one of the parties; and further it has been argued that the result is in the plaintiff's favour, because he has obtained by way of damages one farthing, which he is entitled to receive from the defendants, whereas the latter have recovered nothing. In this view the proviso would have an unreasonable operation. A plaintiff may rely upon two causes of action; he may fail in one, and succeed in the other: is it just that the defendant should be obliged to bear the expense of resisting an unrighteous claim, because the plaintiff may be able to prove that he has a valid claim for a trumpery amount? The objection to this unreasonable construction of the rule is not taken away by the circumstance, that upon good cause being

(1) 11 Ch. D. 416. (2) 3 App. Cas. 944.

shewn the judge may, in his discretion, direct that the costs shall be borne by the party who has caused the unnecessary and perhaps vexatious litigation; it is bad legislation to lay down an unreasonable rule, and then to give power to amend it. I think that the construction suggested on behalf of the defendants is fair and ought to be adopted. "Event" means not merely the finding of the jury, but the event of the cause. If the plaintiff relies upon several grounds of suit, there may be several "events," and in my opinion "event" may be read as a nomen collectivum. Suppose that the word "result" had been used: could it be successfully contended that a defendant is entitled to no costs upon the causes of action as to which he has succeeded, because he has failed as to others? Must there have been a wholly one-sided "result" in his favour in order to entitle him to any costs? I certainly think not. The meaning to be ascribed to the proviso of Order LV., as it stands, is that where there are several events, costs shall follow the events respectively. The question remains, who shall recover the general costs of the cause? The plaintiff will be entitled to recover all those costs which have been incurred in producing the result in his favour; the defendants will get all costs of resisting those parts of the plaintiff's claim which have been defeated. Upon this view the plaintiff, if he is not deprived of his costs either by order of the judge or under the County Courts Act, will still be entitled to the general costs of the cause, from which must be deducted the costs of the portions of his claim, as to which the defendants have succeeded. The items to be allowed to each party can be ascertained without much difficulty by the master upon taxation. The principle which I have endeavoured to lay down is much more reasonable than that contended for by the counsel for the plaintiff.

BAGGALLAY, L.J. I am of the same opinion. I feel no doubt as to the true construction of the orders and rules which have been cited before us. It has been argued that the event of the trial is in favour of the plaintiff. I cannot assent to that, even although only one judgment might have been entered. The plaintiff relied upon three causes of action: he succeeded as to one, but failed as to the other two; if the "event" means the result of the trial, that result is not favourable to either party. It has been also

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contended the word "event" means the whole result, and that a defendant can be entitled to costs only when he has succeeded as to every cause of action relied on by the plaintiff. I cannot agree to this: when a statement of claim sets forth several causes of action, they may be dealt with separately as regards the question of costs. The present practice as to joining several causes of action is regulated by Rules of the Supreme Court, Order XVII., and by the first rule of that order where a plaintiff has joined several causes of action which cannot be conveniently disposed of together, a judge may order them to be tried separately. It is a mere matter of convenience whether distinct causes of action shall be tried together, and if separate trials had been directed of the grievances alleged by the plaintiff, the defendants would have had the costs of those issues upon which they succeeded. And if the plaintiff had brought separate actions for malicious proceedings in bankruptcy and for trespass, the defendants would have been entitled to the costs. It seems to me, therefore, that the costs must be taxed according to the former practice of the Courts of Common Law, and that they must be distributed according to the "event" of the respective issues. If a mistake be made by the master as to a matter of principle, his taxation may be reviewed; but now we have only to lay down a rule to be followed, where each party has succeeded upon one or more of the issues. I quite agree that No. 62 of the Rules of Hilary Term, 1853, has been abolished; we may, however, look upon it as a guide in determining the question before us.

THESIGER, L.J. In this case the plaintiff claimed damages in respect of three distinct causes of action, namely, malicious proceedings in bankruptcy, libel and slander, and trespass. Upon the first trial the plaintiff succeeded in obtaining damages for a substantial amount, but the finding of the jury being deemed unsatisfactory, a new trial was ordered. At the second trial the plaintiff obtained a finding in his favour as to the claim for libel, the damages being assessed at one farthing; but the jury found for the defendants as to the other causes of action. A motion being made to deprive the plaintiff of costs, this Court held upon appeal that there was jurisdiction in the divisional Court to order that they should not be taxed in his favour. The defendants then

claimed the costs of the issues found by the jury in their favour, and the master considered that they were entitled to them, and the Exchequer Division affirmed this view. (1) I am of opinion that the judgment of the Court below was right.

I will briefly allude to the practice as to costs followed in the Courts of Common Law before the Supreme Court of Judicature Acts, 1873, 1875. Under the Common Law Procedure Act, 1852, s. 41, except replevin and ejectment, causes of action, by and against the same parties in the same rights, might be joined in the same suit. Pursuant to the provisions of that and other statutes, the defendant might, as regards some defences without and others with leave, plead several defences. The plaintiff, if he succeeded as to any of the causes of action alleged by him, was entitled to the general costs of the cause, although this right, if the damages recovered were small, was controlled to some extent by certain statutes, such as 43 Eliz. c. 6, s. 2; 21 Jac. 1, c. 16, s. 6; 3 & 4 Vict. c. 24, s. 2; and the statutes relating to the County Courts, the most recent of which was the County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 5. The defendant, however, was entitled to all the costs of the issues as to which he obtained the verdict. The expression "to follow the event," or "to abide the event," was, in regard to costs, an expression in common use in agreements of reference; and when costs of the cause were expressed to follow or abide the event, they would have been distributed in the manner I have described.

Under the Supreme Court of Judicature Acts, 1873, 1875, the power conferred upon a plaintiff of joining distinct causes of action is regulated by Order XVII., and it may be remarked that the rules of that order certainly do not limit the right previously existing under the Common Law Procedure Act, 1852. Again issues may have been done away with in the old sense of the word strictly used; but in a very similar sense they still remain. Their existence is clearly contemplated by Order XIX., rules 18, 21; Order XXVI. and Order XXXVI., rules 26, 27, 29. No doubt, before the Judicature Acts, 1873, 1875, besides issues occurring in an action at common law, there were issues which did not so arise: as for instance, issues of interpleader, and issues directed by the Court of Chancery and by the Court of Probate under

(1) Ante, p. 15.

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20 & 21 Vict. c. 77, s. 35; but the orders, which I have mentioned, clearly relate to issues arising in an action brought in the High Court. This being so, it is reasonable to suppose that the legislature would leave unaltered a practice as to the taxation of costs upon issues arising in an action where it did not appear that the practice required to be amended. Now by Order LV. the practice as to costs formerly prevailing in the Court of Chancery is introduced into the Common Law divisions of the High Court, and they are placed in the discretion of the Court, but subject to the proviso as to trials by a jury, which directs that unless the judge or Court shall otherwise order, costs shall follow the event. This proviso may be construed in more modes than one. It may be argued that if the plaintiff succeeds as to any part of his claim, he is entitled to all the costs, although he has failed as to material portions of his claim; and it may also be argued that if each party partly succeeds, neither is to have any costs. Either of these contentions if acceded to would be sufficient to deprive the defendants of their costs: but I cannot think that either is right. It appears to me more reasonable to give to the language used the meaning which it bore prior to the Judicature Acts. The "event" of an action is complex, and the word, as used in the proviso to Order LV., may be read distributively: it must be so read as regards distinct causes of action according to the view of the Exchequer Division (1) and, in my opinion, the general costs of the cause follow the judgment, but the costs of the particular issues must be respectively taxed in favour of the party who has succeeded on them. I am glad to know that this view is in accordance with the practice which has been followed, and that it is to some extent supported by the authorities decided, since the Judicature Acts. In *Blake* v. *Appleyard* (2) it was held that although a plaintiff might be entitled to the costs of the cause generally, yet the defendant was entitled to the costs of his counter-claim. In *Davidson* v. *Gray, Barrow, & Co.* (3) it seems to have been considered that although the finding was in favour of the plaintiff, the defendants ought to have the costs of the counter-claim upon which they substantially succeeded. The language of the judgment of this Court in *Berdan* v. *Greenwood* (4) is not

(1) Ante, p. 15.
(2) 3 Ex. D. 195.
(3) See note at end of case.
(4) 3 Ex. D. 251. at p. 257.

decisive as to the present question; but it may be cited as further illustrating the view which has been hitherto taken.

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I am of opinion that the decision of the Exchequer Division was right and ought to be affirmed.

Appeal dismissed. (1)

Solicitors for plaintiff: *G. S. & H. Brandon.*

Solicitor for defendants: *J. Hands.*

(1) DAVIDSON *v.* GRAY, BARROW, & CO.

Action to recover 51*l.* due for freight. The defendants having paid 41*l.* 2*s.* 11*d.* into court admitted by their defence the plaintiff's claim for 51*l.*, but claimed by way of counter-claim the sum of 9*l.* 17*s.* 1*d.* for injury to the cargo. The action having been remitted to Westminster County Court for trial under 19 & 20 Vict. c. 103, s. 26, the registrar certified the result to be a finding for the plaintiff for 16*s.* The plaintiff got from a master a judgment signed for that sum with costs.

Application was made to the master by the defendants to tax the costs according to the issues, of which they contended that they had won all those raised by the counter-claim, and that, the plaintiff's claim being admitted, there was no issue found for the plaintiff.

The master declined so to tax upon the certificate as it stood, but stayed the taxation to enable the defendants to apply to the Court to have the certificate amended by distributing the findings upon the issues.

1879. March 17. *J. A. McLeod*, for the defendants, moved accordingly.

Bucknill, for the plaintiff.

THE COURT (Cockburn, C.J., and Mellor, J.) were of opinion that a material issue having been decided in the defendants' favour, an opportunity ought to be afforded them of obtaining their costs upon it. The general conclusion as to the sum of 16*s.* was for the plaintiff, but the defendants had established all the rest of their counter-claim.

Motion granted.

The plaintiff appealed.

April 9. *Edward Pollock*, for the plaintiff, contended that as the plaintiff had recovered 16*s.* more than the amount paid into court, he was entitled to the costs.

J. A. McLeod, for the defendants.

THE COURT (Brett, Cotton, and Thesiger, L.JJ.) held that the Queen's Bench Division in its discretion might direct the registrar to give a new certificate; that the defendants would have been entitled to the costs of the counter-claim if there had been a specific finding, and that the course taken in the Queen's Bench Division was reasonable.

Appeal dismissed.

Solicitors for plaintiff: *Inyledew, Ince, & Greening.*

Solicitor for defendants: *Wm. Beck.*

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March 9.

ASHENDON *v.* THE LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY.

Railway Company—Railway and Canal Traffic Act, 1854 (17 & 18 *Vict. c.* 31), *s.* 7—*Notice—Limiting Liability—Reasonable Conditions.*

A condition that a railway company will not be liable "in any case" for loss or damage to a horse or dog above certain specified values delivered to them for carriage unless the value is declared, is not just and reasonable within sect. 7 of the Railway and Canal Traffic Act, 1854, as it is in its terms unconditional, and would, if valid, protect the company even in case of the negligence or wilful misconduct of their servants.

The case of *Harrison* v. *London, Brighton, and South Coast Ry. Co.* (2 B. & S. 122; 31 L. J. (Q.B.) 113), deciding that such a condition is reasonable, is overruled by *Peek* v. *North Staffordshire Ry. Co.* (10 H. L. C. 473; 32 L. J. (Q.B.) 241).

SPECIAL CASE stated in an action tried at the county court of Sussex, holden at Brighton, from which the following facts appeared:—

The plaintiff delivered an Italian greyhound to the defendants' servants at the Brighton station to be conveyed by the defendants on their railway to Norwood Junction, and from thence by the London, Chatham, and Dover Railway Company to Rochester, and at the same time the plaintiff signed a printed ticket in the form required by the defendants to be signed by persons sending dogs by their railway. The ticket contained the following conditions:—

"Received the annexed ticket, subject to the following conditions:—The company will not be liable, in any case, for loss or damage to any horse, or other animal, above the value of 40*l.*, or any dog above the value of 5*l.*, unless a declaration of its value, signed by the owner or his agent, at the time of booking, shall have been given to them; and by such declaration the owner shall be bound, the company not being in any event liable to any greater amount than the value so declared. The company will in no case be liable for injury to any horse, or other animal, or dog, of whatever value, where such injury arises wholly or partially from fear or restiveness. If the declared value of any horse or other animal exceed 40*l.*, or any dog 5*l.*, the price of conveyance will, in addition to the regular fare, be after the rate of 2½ per

cent., or 6*d.* per pound, upon the declared value above 40*l.*, whatever may be the amount of such value, and for whatever distance the horse or other animal is to be carried."

No declaration of the value of the dog was made, and no additional fare was paid by the plaintiff.

During the transit the dog was lost without any neglect or default on the part of the defendants or the London, Chatham, and Dover Railway Company. The county court judge, however, was of opinion that the conditions on the ticket were unjust and unreasonable, and gave judgment for the plaintiff for 10*l.* 10*s.*

The question for the opinion of the Court was whether the plaintiff was entitled to recover in the action.

June 13, 1879; Mar. 2, 1880. *Lopes,* for the defendants. The condition is the same as that which in *Harrison* v. *London, Brighton, and South Coast Ry. Co.* (1) was held to be reasonable, and that decision is not affected by *Peek* v. *North Staffordshire Ry. Co.* (2)

Fillan, for the plaintiff. The decision in *Peek* v. *North Staffordshire Ry. Co.* (2) turns upon this, that a notice similar to the one in this case covers all negligence, or even fraud or dishonesty, on the part of the carrier, and the former case of *Harrison* v. *London, Brighton, and South Coast Ry. Co.* (1) is in effect though not in terms overruled.

Lopes, in reply. Even if the plaintiff's contention as to the condition is correct, there is here an alternative offered, since the defendants will carry uninsured animals at their ordinary rate, or will insure at the rates mentioned in the condition. *Lewis* v. *Great Western Ry. Co.* (3) is an authority that in such case a condition exempting the railway company from liability when carrying at the lower rate is reasonable. Further, in *Peek* v. *North Staffordshire Ry. Co.* (2), the condition applied to all marbles independently of their value, here the condition only applies to dogs above the value named.

Cur. adv. vult.

(1) 2 B. & S. 122; 31 L. J. (Q.B.) 113.

(2) 10 H. L. C. 473; 32 L. J. (Q.B.) 241.

(3) 3 Q. B. D. 195.

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March 9. The following judgments were delivered:

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KELLY, C.B. In this case I am of opinion that the plaintiff is entitled to the judgment of the Court. The case is simply this. The plaintiff delivered a dog to the defendants to be conveyed by them, and on receipt of the dog in the usual way a ticket was delivered to the plaintiff, containing an agreement upon the terms of which depends the answer to the question whether the plaintiff is entitled to recover in this action or not. If it is a reasonable agreement the defendants are entitled to succeed, but if it is not the plaintiff is entitled to our judgment. The question whether it is a reasonable agreement depends on the terms used. If they are absolute and unconditional to the effect that the company shall not be liable in any event, it is clear on the authority of *Peek* v. *North Staffordshire Ry. Co.* (1), that the plaintiff is entitled to recover. The question therefore is whether the agreement when fairly construed is, in its terms, absolute and unconditional, or whether certain qualifications or exceptions such as that the company are to be liable only in case of gross negligence, or for the wilful misconduct or felony of their servants, are to be read as included in this agreement. If a few words had been added importing those qualifications, this would have been a lawful agreement. In the absence of those words, I think the agreement is clearly unreasonable, because it provides not only for the accident that occurred without negligence but is absolute in its terms that, in no case, shall the company be liable. Under these circumstances without going into the decisions or the conflict of opinion that there has been, it is sufficient for me to say that on the authority of *Peek* v. *North Staffordshire Ry. Co.* (1) and on the construction of this agreement it is unreasonable and not binding on the plaintiff.

My Brother Hawkins has shewn me a judgment which he has prepared, going more into detail than I have done, and with which I entirely agree, but at the same time I desire to limit my judgment to the simple question, on which I have already given an opinion, whether this agreement is or is not, on the authority of the cases cited to us, a reasonable one. I am of opinion that it is not, and that our judgment should be for the plaintiff.

(1) 10 H. L. C. 473; 32 L. J. (Q B.) 241.

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HAWKINS, J. This action was brought in the county court at Brighton, to recover from the defendants the sum of 10*l.* 10*s.* the value of an Italian greyhound intrusted by the plaintiff to their care to be carried by them as common carriers from Brighton to Rochester (by their own and the London, Chatham, and Dover lines of railway), and which during its transit, without any negligence or default of the defendants or their servants, was accidentally lost. The defendants denied their liability upon the ground that the dog was carried by them upon a special contract; which, under 17 & 18 Vict. c. 31 (the Railway and Canal Traffic Act, 1854), was effectual to protect them, at least from the loss which actually happened. The facts are so clearly stated in the special case, that I do not think it necessary to repeat them. The matter was argued before us with great ability. On the part of the plaintiff by Mr. Fillan, who, admitting that *Harrison* v. *London, Brighton, and South Coast Ry. Co.* (in the Exchequer Chamber) (1), was in point against his case, contended that that authority was virtually overruled in the House of Lords by *Peek* v. *North Staffordshire Ry. Co.* (2) On the other hand Mr. Lopes contended that *Harrison's Case* (1) still remained law; and in support of this contention he cited the recent case of *Lewis* v. *Great Western Ry. Co.* (3)

After a careful consideration I am of opinion that the plaintiff is entitled to our judgment. There can be no question that the contract under which the dog was delivered to and received by the defendant was—if just and reasonable—in its terms sufficient to exempt them from all liability for its loss; no matter how that loss was occasioned; for its value (being above 5*l.*) was not declared, and no increase of the ordinary price for the carriage of dogs above the value of 5*l.* was either demanded or paid. The plaintiff, however, alleges that the contract is not a just and reasonable one, so as to satisfy the requirements of 17 & 18 Vict. c. 31, s. 7. Whether it is or is not is the sole question we have to determine. To me it seems that this question is concluded by the case of *Peek* v. *North Staffordshire Ry. Co.* (2) above

(1) 2 B. & S. 122; 31 L. J. (Q.B.) 113.

(2) 10 H. L. C. 473; 32 L. J. (Q.B.) 241.

(3) 3 Q. B. D. 195.

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referred to, where it was expressly held that a condition exempting the company from responsibility for injury, however caused, without limitation or exception, was neither just nor reasonable; for such a condition would, if valid, exempt them from liability for loss or damage happening through the grossest, most culpable negligence, or even wilful misconduct. In my opinion, the condition relied on by the now defendants that they will not be liable "in any case" unless a declaration of value is signed and delivered to them at the time of booking (1), would equally in the absence of such declaration cover every loss however occasioned. The case of *Peek* v. *North Staffordshire Ry. Co* (2), is therefore decisive against the defendants, and being a decision of the House of Lords, we are absolutely bound by it. *Harrison* v. *London, Brighton, and South Coast Ry. Co.* (3), must therefore, so far as it affects the question before us be considered as virtually overruled.

Had the defendants by their conditions stipulated, as they easily might in a very few words, simply that they would not be responsible for loss resulting from mere accident without neglect or default; such restriction of their common law liability would have been both just and reasonable, and if embodied in a signed contract, would have protected them against liability for the loss which occurred. We are not at liberty, however, to set aside as null and void, and exclude from our consideration so much of the condition as covers loss or damage by neglect or default, and apply it, as it might by a very slight alteration in its language have been applied, to mere accidental loss or injury, for that would be to turn an unreasonable into a reasonable contract. We are bound to construe the contract as we would have done at the moment it was made, without regard to subsequent events, and so construing it, it is clear that it was, as the law is now settled, unreasonable, for it was framed to cover every loss, even though

(1) It is to be observed that by the condition as stated in the special case, though the company require a declaration when the value of the dog is above 5*l.*, no additional price for conveyance of dogs between the value of 5*l.* and 40*l.* is required, the 2½ percentage being only stipulated for "upon the declared value above 40*l.*" (Note to the written judgment of Hawkins, J.)

(2) 10 H. L. C. 473; 32 L. J. (Q.B. 241.

(3) 2 B. & S. 122; 31 L. J. (Q.B.) 113.

occasioned by the wilful misconduct of the defendants or their servants.

The case of *Lewis* v. *Great Western Ry. Co.* (1) does not in the least degree militate against this view. There it was held that a contract on the part of the company to carry cheeses at a lower than the ordinary rate of carriage, on condition that the company should not be liable for loss arising from any cause, except the wilful misconduct of their servants, was a just and reasonable contract, for a consideration in the shape of a lower tariff was offered to the sender of the goods as an inducement to him to limit his common law right, and he had the option to send them at the ordinary rate of carriage, holding the defendants to their ordinary liability as carriers, or at a lower rate of carriage, taking upon himself the risk of injury happening to his goods in the course of their transit through any neglect or default of the company or their servants not amounting to wilful misconduct. Here no such inducement or option was offered. Moreover, in that case loss occasioned by wilful misconduct of the defendants' servants was expressly excepted from the condition, which is not the case in the contract now under consideration.

My opinion therefore is, that the county court judge was right in his decision. The judgment entered for the plaintiff will, therefore, stand confirmed, with costs.

Judgment for the plaintiff.

Solicitors for plaintiff: *Smith, Fawdon, & Son, for Lamb & Evett, Brighton.*

Solicitors for defendants: *Norton, Rose, Norton, & Brewer.*

(1) 3 Q. B. D. 195.

1880
March 15.

METROPOLITAN INNER CIRCLE RAILWAY COMPANY *v.* METROPOLITAN RAILWAY COMPANY.

Practice—Notice of Trial—Entry of Cause—Close of Pleadings—Order XXXVI., rules 3, 17 *a.*

A cause cannot be entered for trial under Order XXXVI. before the pleadings are closed.

MOTION by the defendants, on appeal from chambers, to strike the case out of the list of causes for London.

The action was brought on an award, and the defendants delivered a defence and counter-claim, to which, on the 2nd of February last, the plaintiffs delivered a reply, and at the same time gave notice of trial for the 12th of February, and on the next day set the action down for trial. On the 6th of February an order was made on a summons taken out by the defendants that the plaintiffs should amend their reply or give particulars, and on the same day it was ordered that the defendants should be at liberty to rejoin specially, and should have seven days after the amended reply was delivered in which to do so. The defendants subsequently took out a summons to strike out the entry of the cause for irregularity, on which the master declined to make an order, and his decision was affirmed on appeal to a judge.

W. Graham, moved. It cannot have been intended that an action should be entered for trial before it is ready, and Order XXXVI., rule 3 (1), must be taken to give the plaintiff a right to give notice of trial with the reply only when it closes the pleadings. Any other ruling would be inconsistent with the rights given to defendants by rules 3 and 4 of the same order, and would render it impossible to comply with rule 17 a, which requires

(1) Order XXXVI., r. 3: Subject to the provision of the following rules the plaintiff may, with his reply, or at any time after the close of the pleadings give notice of trial of the action, and thereby specify one of the modes mentioned in rule 2, and the defendant may, upon giving notice within four days from the time of the service of the notice of trial, or within such extended time as a Court or a judge may allow, to the effect that he desires to have the issues of fact tried before a judge and jury, be entitled to have the same so tried.

copies of the whole of the pleadings in the action to be delivered by the party entering it.

A. L. Smith, for the plaintiffs, contrà. The practice at chambers has been in strict accordance with the rule that the plaintiff may "with his reply" give notice of trial, and the rule is a convenient one, as otherwise the plaintiff would be at the mercy of the defendant who, by counter-claim, could throw the case over indefinitely. If the plaintiff can properly give notice, it follows that he must be able to give effect to that notice by entering the action. At any rate in this case the defendants by taking out a summons to amend the pleadings waived the irregularity if there was one. If the defendant is inconvenienced in his defence, he must make an application to postpone the trial, and he cannot limit the right of the plaintiff to enter the action for trial.

W. Graham, was not heard in reply.

KELLY, C.B. I understand it to be admitted by both parties that the record is not yet completed. It would be a matter of regret if under the provisions of the Judicature Acts a plaintiff should be unduly delayed in the trial of his cause, but it would be equally to be regretted if a defendant should be disentitled to plead whatever he may plead bonâ fide in his defence, and in any form that may be necessary to raise that defence, whether his doing so may protract the pleadings or not. Now let us look at what these rules are. In the first place there is Order XXXVI., rule 3. In this case the plaintiffs have accepted the first alternative, and given notice of trial with the reply. I agree they had a right to do so, and that the defendants had no right by pleadings or in any other way to delay the natural and legitimate course of the case from the time of this notice until it should come on for trial. But the plaintiffs also entered the cause for trial. This they have done at their peril, and at a time when they were unable to comply with the provisions of rule 17 a of the same order, by delivering two copies of the whole of the pleadings in the action to the officer who enters it for trial. I am of opinion that though the plaintiffs had a right to give notice of trial, they could not in this case enter the cause for trial. It would be absurd to suppose that the legislature could ever have contem-

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plated a rule which would have the effect of depriving parties of pleading that which they may be entitled to plead, and allowing the cause prematurely to come to trial before the record is complete. Under these circumstances the appeal must be allowed.

STEPHEN, J. I am of the same opinion, though I arrive at it in a somewhat different mode. It appears to me that the proper meaning of rule 3 is that the plaintiff may give notice with his reply if that closes the pleadings, or at the close of pleadings if they are more protracted; that seems to me the correct way of interpreting rule 3, and it would appear to make all the other rules consistent, and to arrive at the natural result that notice of trial should not be given till the pleadings are completed. It is said that another rule has sprung up at chambers, which is convenient because it discourages defendants who counter-plead in an evasive manner from unduly spinning out proceedings. I do not think we ought to construe rules in this manner. The reasonable view seems to be this: notice of trial not to be given until the record is complete, and though this may give rise to inconvenience by giving an opening to defendants who wish to avoid just claims, that is an inconvenience which is not separable from the whole principle of the Judicature Acts. As to the waiver, I hardly think the principle laid down applies to a case of this sort. I do not think the waiver of a mere irregularity could force a party to go to trial on an imperfect record, upon which the judge before whom it came would not know how to decide or how to direct a jury. Upon these grounds I think the appeal must be allowed.

Order absolute.

Solicitors for plaintiffs: *Newman, Stretton, & Hilliard.*
Solicitors for defendants: *Burchells.*

[IN THE COURT OF APPEAL.]

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March 13.

THE TUNBRIDGE WELLS LOCAL BOARD *v.* AKROYD.

Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 179, 180, 257—*Local Board—Expense of paving Street—Award—Liability of Frontager not a party to Arbitration.*

An award in an arbitration under the Public Health Act, 1875, between one of several frontagers called upon to pay the expense of paving a street and an urban authority, by which the arbitrator has altered not merely the assessment upon the particular frontager, but the assessment in regard to all the frontagers, is not binding upon any frontager not a party to the arbitration, so as to entitle the urban authority to recover from him the sum which would be due from him on the footing of the altered assessment.

16 QBD 311

SPECIAL CASE stated in an action brought in the County Court of Kent at Tunbridge Wells, to recover 10*l.* 5*s.* 4*d.* "in respect of the sewering, levelling, metalling, paving, and channelling a street called Broadwater Down Road, within the plaintiffs' district." The following are the facts material to be stated:—

The plaintiffs were the urban sanitary authority under the Public Health Act, 1875, for the district of Tunbridge Wells. The defendant was the owner within the meaning of that Act of premises abutting upon the street or highway called Broadwater Down Road, within the district. Broadwater Down Road was a street or highway not repairable by the inhabitants at large. On the 9th day of May, 1876, the plaintiffs served the defendant with a notice under the 150th section of the Public Health Act, 1875, to sewer, level, pave, flag, and channel the street or highway within the time and in the manner specified in such notice, and according to plans and sections deposited in the office of the urban sanitary authority at the Town Hall in Tunbridge Wells. The street or highway not being sewered, levelled, paved, flagged, and channelled by the defendant and the other owners of premises abutting upon the highway in pursuance of the notices served upon him and them in that behalf, the plaintiffs as urban sanitary authority, after the expiration of the time mentioned in the notices, themselves executed the works therein referred to, and properly expended in and about the

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works 4036*l.* 15*s.* 11*d.* An apportionment was thereupon made by the surveyor of the plaintiffs of 4036*l.* 15*s.* 11*d.* upon the owners of the premises abutting upon the road according to their frontages, and the sum of 80*l.* 12*s.* 6*d.* was apportioned upon the defendant as his share. Notice in writing of such apportionment under the hand of the surveyor and clerk of the plaintiffs was served upon the defendant on or about the 23rd of July, 1877, and in the notice it was stated that the apportionment of 80*l.* 12*s.* 6*d.* upon the defendant would be binding and conclusive upon him, unless within the expiration of three months from the date of the notice he should by notice in writing to the plaintiffs as the urban authority dispute the same. The defendant did not within the three months, or at any time, give notice to the urban authority of any intention to dispute the surveyor's apportionment, and on the 3rd of October, 1877, the defendant duly paid to the plaintiffs the sum of 80*l.* 12*s.* 6*d.*

Certain owners of premises abutting upon the road gave notice to the plaintiffs of their intention to dispute the apportionment made by the surveyor upon them, and in pursuance of the Public Health Act, 1875, such owners and the plaintiffs agreed that such disputes should be referred to an arbitrator. The arbitrator by his award made a re-apportionment amongst all the owners of premises abutting upon the road (the defendant amongst the number) of the 4036*l.* 15*s.* 11*d.* aforesaid, and in such re-apportionment he apportioned 90*l.* 17*s.* 10*d.* as the amount chargeable to the defendant in respect of his premises abutting upon the road, instead of the 80*l.* 12*s.* 6*d.* apportioned by the surveyor as aforesaid. The defendant had no notice of the proceedings taken before the arbitrator, nor of the agreement between the owners aforesaid and the plaintiffs to refer the matters then in dispute betweeen them, nor was the defendant in any way a party to the arbitration, and the award was made entirely without his knowledge, approbation, or consent. A notice in writing of the re-apportionment from the local board to the defendant was served upon him by the plaintiffs on the 26th of April, 1878, which was the first time notice was given to him of the same, and a demand was then made upon him for payment of the sum of 90*l.* 17*s.* 10*d.*, being the amount so re-apportioned upon him as aforesaid. The

plaintiffs had credited the defendant with the sum of 80*l.* 12*s.* 6*d.* so paid as aforesaid, and the sum of 10*l.* 5*s.* 4*d.* claimed in this action, was the difference between the surveyor's apportionment and the amount re-apportioned by the arbitrator. The county court judge was of opinion that the plaintiffs were entitled to recover from the defendant the amount apportioned upon him by the arbitrator, and he gave judgment for the plaintiffs for the amount claimed.

The question for the opinion of the Court was whether this judgment was right.

May 16, 1879. *Webster, Q.C.* (*Erskine Pollock,* with him), for the plaintiffs.

Cave, Q.C. (*Edward Pollock,* with him), for the defendant.

KELLY, C.B. I am clearly of opinion that the defendant is not liable, and that the sum in question cannot be recovered from him. Express power is conferred upon the board to recover the amount assessed by their surveyor against any frontager, who shall fail to pay that amount or to object to it within three months; and, if the matter be referred, the award of an arbitrator or umpire is made final and binding on all parties to the reference, and therefore the amount awarded may undoubtedly be recovered by the board against all or any parties or party to the reference; but the Public Health Act, 1875, is wholly silent as to any right in the board to demand, or upon the liability of any one whomsoever to pay, any sum of money except the amount of the surveyor's assessment, in case it shall not be objected to within three months, and the sum found and awarded by the arbitrator against any party or parties to the reference. And I am not aware that any power is conferred by any Act of Parliament, and assuredly no power is conferred by the common law upon any persons, incorporated or unincorporated, to recover by action against any subject of this realm any money, or land, or goods, or other property, at law or in equity, without the party sought to be made liable having the opportunity of appearing before the Court in which the proceeding is instituted, and of being heard by himself or his counsel in his defence against the

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claim made upon him. And I must say that it appears to me, not only a violation of one of the first principles of the law of England, but also neither more nor less than an outrage upon justice, to hold that a court of law, or an arbitrator, or any other tribunal in in this country, can adjudge a man to lose his money or his land without being heard or having the means of being heard in his defence. The Act of Parliament, upon which these proceedings have taken place, is certainly framed in a manner calculated to create many and great difficulties in the discharge of their duties by an urban authority in cases like that which is now before the Court. They have, indeed, power to recover against the frontagers the sums assessed by the surveyor if their amount be undisputed; but if a single frontager (of whom it is said there are fifty-one in this case) object to the assessment of the surveyor, the board have no choice, and, in order to recover the contribution to which he may be liable, must proceed under the the arbitration clause. In the first place, therefore, the objector, unless he can agree with the board upon the appointment of a single arbitrator, is entitled to appoint one arbitrator, and the board to appoint another. What then is to be done if, instead of the four objectors who in this case have all agreed upon the appointment of a single arbitrator, each of the fifty-one frontagers shall insist upon the appointment of his own arbitrator? There must either be as many arbitrators as there are objectors, in which case it would be obviously impossible to give effect to the Act of Parliament, or there must be, we may suppose, twenty or more arbitrators on the one side appointed by the objectors, and either one and one alone, or a substantial number appointed by the board. And in the case of a difference of opinion among them, as there is no provision for an award by the majority, they must all agree upon an umpire or a number of umpires. I see no escape from the difficulties and the confusion which would thus be created, unless we are to apply some provisions applicable to such a case, but which are not found in the Act of Parliament. And here the startling difficulty occurs, whether the objector or objectors who demand the arbitration be one or twenty in number, the award, to be of effect, must be one only, for it must deal with every frontager's amount of liability, and the whole together must amount to the aggregate sum, an

arbitrator having no power to alter or deal with the amount expended. It is possible—but I forbear to pronounce any opinion upon the question, because it does not arise in this case—that where there are certain dissentients who insist upon the arbitration, and others who are content with the assessment of the surveyor and do not think fit to concur in the arbitration, inasmuch as the award of an arbitrator must be binding upon the whole body of frontagers or upon none, a power may be implied in the board to give notice to all who have not objected, and so who are no parties to the arbitration, that they may appear before the arbitrators and contest the amount each of his own liability. But there is no such express power in the Act, and if there were it has not been exercised in the present case. However that may be, we come back to the question, Where is there a provision in the Act of Parliament enabling the board to recover this sum of 10*l.* 5*s.* 4*d.*? Not by the clause enabling them to recover the amount of the assessment of the surveyor, because that amount is 80*l.* 12*s.* 6*d.* and no more, and has been paid. Nor is there any power to recover the amount assessed by the arbitrator except against the parties to the reference. It was urged at the bar that if this be so the board have no power to recover the entire sum, which is admitted to have been correctly ascertained. But what has the defendant to do with this question? He has paid all that the surveyor reported him to be liable to, and no doubt the four objectors have paid all that the arbitrator has awarded against them, and all that can be said on this claim is that the Act contains no provision establishing the liability of the defendant to pay, or creating a power in the plaintiffs to recover it. They are, therefore, in the same condition as if a frontager had become insolvent and was unable to pay his contribution.

It was also insisted that the award is final and binding; and so it is as respects the four objectors who were parties to the reference. But where are there any words in the Act to make the award binding on any one else? Suppose the award to have diminished instead of increasing the amount of the assessment by the surveyor: would the defendant, and others who had acquiesced in and paid the amount of the surveyor's assessment, be entitled to recover back the difference between that amount and the lesser

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amount awarded by the arbitrator? The truth is that the Act of Parliament is so negligently and improvidently framed as to create great and formidable difficulties in carrying its provisions into execution. But this cannot justify the board in setting at nought the first principles of the law and constitution of this country by seeking to recover in a court of law or equity, or before any other tribunal, the property of the subjects of the realm without permitting them to appear and be heard in their defence.

HUDDLESTON, B. I regret that I cannot come to the same conclusion, and I hope that, in supporting the judgment of the county court judge, I am not infringing the principles of justice or those of the law of England.

Sect. 257 of the Public Health Act enables the local authority to recover the expenses incurred under s. 150 from the owners. The proportion of those expenses is to be ascertained by the surveyor in the first instance, who is to settle the proportion of the whole expenses according to the frontage of the respective premises of the owners, and, unless it be disputed within three months under the 257th section, the surveyor's apportionment becomes final and conclusive upon the owner. There is no notice required to be given to the owner that the surveyor is about to make the apportionment, nor is it enacted that the owners have any right to appear before the surveyor and claim to be heard by him; but if the apportionment of the surveyor is disputed, it must then be referred to arbitration in manner provided by the Act. It may be that the legislature thought that the decision of the officers of the urban authority ought not to be final as against the owner, and if any owner disputed it he might be entitled to a more independent tribunal, and it therefore provided that an arbitrator should be appointed under ss. 179, 180 of the Act; but then I think that the arbitrator or umpire so appointed is to be in substitution of the surveyor to re-apportion the amount of the compensation according to the frontage of the respective premises. As he has to re-apportion a fixed sum, it is obvious that the alteration of the amount payable by any one of the owners would require a corresponding alteration in that of all the others. As the parties were not entitled to go before the surveyor in the

first instance, so are they not entitled to go before the arbitrator, and therefore no notice need be given to all the respective owners. If injustice is likely to be done, there is power to appeal to the Local Government Board under s. 268.

It is clear to me that the finding of the surveyor, though acquiesced in by the defendant, is not final and binding on the board if any owner appeals, because, if an arbitrator be appointed, he must deal with the apportionment of the whole sum expended, and the objection that the defendant had no notice of the reference, and was not a party to it, cannot operate as a defence.

I think, therefore, that the plaintiffs are entitled to recover.

The defendant appealed to the Court of Appeal.

1879. Dec. 20. *Cave, Q.C.*, and *Hannen*, for the defendant. It is submitted that the decision of the county court judge, although approved of by Huddleston, B., was wrong, and that the judgment of Kelly, C.B., enunciates the principles properly applicable to the present case.

The question between the parties depends upon the true construction of the Public Health Act, 1875. By s. 150 an urban authority may by notice require the adjoining owners to put into good condition a street within its district, and if the notice be not complied with, the urban authority itself may execute the works and may recover in a summary manner the expenses incurred from the adjoining owners according to their frontages, in such proportion as may be settled by the surveyor or in case of dispute by arbitration. Sections 179 and 180 contain directions as to the procedure upon arbitrations. Sect. 257 enacts that where expenses have been apportioned by the surveyor, the apportionment is conclusive upon the owner, unless within three months he disputes the same. These provisions do not make the award of an umpire or of arbitrators binding upon a frontager who is not a party to the reference. In fact, the plaintiffs claim to make the defendant pay a sum of money pursuant to the award of a person, in whose appointment he had no voice, and from whose decision he has no means of appealing.

R. E. Webster, Q.C., and *Erskine Pollock*, for the plaintiffs. It

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is not to be presumed that a sanitary authority will commit an unjust act; for the members are an elected body (Public Health Act, 1875, s. 8), and represent all the ratepayers; if they misconduct themselves, they may be dismissed at the expiration of their term of office; they would naturally protect the interests of every ratepayer, and it is, therefore, unnecessary that the arbitration should have been between the sanitary authority and all the frontagers. The surveyor does not arbitrate, he only apportions; his apportionment is not conclusive as to the question of liability: *Hesketh* v. *Atherton Local Board* (1); and even as to the question of the amount to be paid it does not become binding until the period of three months has elapsed; upon notice within three months from one adjoining owner that he disputes the apportionment, the whole matter is at large, and if an error has been committed by the surveyor there must be a new apportionment upon all the frontagers by the arbitrator: *Cook* v. *Ipswich Local Board of Health* (2); and when an apportionment has been finally made, it cannot be disputed by any one: *Bayley* v. *Wilkinson* (3); *Nesbitt* v. *Greenwich Board of Works.* (4) Many provisions of the Public Health Act, 1875, appear to be in conflict with private rights; but the legislature intended that these should be disregarded in order that objects of public utility might be attained.

Cave, Q.C., in reply. The apportionment by the surveyor was not a nullity; therefore a new apportionment binding upon the defendant cannot be made by the arbitrator.

Cur. adv. vult.

1880. March 13. The judgment of the Court (Bramwell, Cotton, and Thesiger, L.JJ.) was delivered by

THESIGER, L.J. We are of opinion that this appeal must be allowed.

The only question raised by it is whether an award in an arbitration under the Public Health Act, 1875, between one of several frontagers called upon to pay the expenses of paving a

(1) Law Rep. 9 Q. B. 4.
(2) Law Rep. 6 Q. B. 451.
(3) 16 C. B. (N.S.) 161; 33 L. J. (M.C.) 161. 10 Jur. N.S. 726
(4) Law Rep. 10 Q. B. 465.

street and an urban sanitary authority, by which award the arbitrator has altered, not merely the assessment upon the particular frontager, but the assessment in regard to all the frontagers, is binding upon any frontager not a party to the arbitration, so as to entitle the sanitary authority to recover from him the sum which would be due from him on the footing of the altered assessment. We say that this is the only question, because, as appears from the case and the documents referred to in it, the respondents (the sanitary authority) did not upon the award being made, even assuming that they could do so, take upon themselves to make a new assessment upon the lines of, and in the proportions settled by, the award, and thus to give each of the frontagers, who had not disputed the original assessment upon them, an opportunity, if so minded, of disputing in the manner provided by the Act, the new, but treated the award as absolutely binding and as settling, without further opportunity of dispute, the proportions in which all the frontagers were to pay. The particular frontager now appealing had, before the award in question was made, paid to the plaintiffs his proportion of the original assessment, but the learned county court judge, before whom this matter was tried, decided that he was liable to pay the additional sum claimed by the plaintiffs on the footing of the award, and upon appeal to the Exchequer Division, the Court being equally divided, the decision stood.

It is contended, on behalf of the plaintiffs, that upon the true interpretation of the Public Health Act, 1875, the decision is right. The sections of the Act, upon which the question mainly turns, are sects. 150, 179, 180, and 257. Section 150 is that from which the powers of the urban sanitary authority in the particular matter are derived. By virtue of its provisions they may in the case of a street within their district, not being a highway repairable by the inhabitants at large, by notice addressed to the respective owners or occupiers of the premises fronting, adjoining, or abutting on such parts thereof as may require to be paved, &c., require them to pave, &c., within a time specified in such notice; and the section further provides that: "If such notice is not complied with, the urban authority may, if they think fit, execute the works mentioned or referred to

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therein; and may recover in a summary manner the expenses incurred by them in so doing from the owners in default, according to the frontage of their respective premises, and in such proportion as is settled by the surveyor of the urban authority, or (in case of dispute) by arbitration in manner provided by this Act." Pausing for a moment upon these last words, it appears to us that the section has in view, not a dispute between the frontagers generally on one side and the urban authority on the other, but a dispute in which the owner of a particular set of premises complains of the apportionment as regards himself personally. The meaning, however, of this section and the machinery by which it is to be worked, are more fully explained by s. 257. From that section it appears that the surveyor having settled and apportioned the expenses of executing particular works, including works referred to in s. 150, for the repayment of which the owner of any premises is made liable, a notice of the amount settled by the surveyor to be due from such owner is to be served upon him, and a period of three months is given him within which he may by written notice dispute the apportionment. In the event of that period elapsing without the apportionment being disputed it becomes binding and conclusive upon such owner. This section is, it is true, one which relates, not merely to expenses incurred under s. 150, but also to other expenses, some of which would be incurred in reference to a single set of premises; but after making allowance for this fact we cannot but look upon the section as fortifying the view, that the dispute referred to in s. 150 is a dispute between a particular owner and the urban authority, and not one in which the frontagers generally would be interested; and the most natural as well as reasonable interpretation of both sections read together would be, that quoad any owner not disputing the apportionment of the surveyor within the prescribed period it becomes binding and conclusive, although another owner may have within the period disputed it. Sections 179 and 180, which regulate arbitrations, still further confirm this view. The former section provides that, "in case of any matter which by this Act is authorized or directed to be settled by arbitration, then, unless both parties concur in the appointment of a single arbitrator, each party shall

appoint an arbitrator to whom the matter shall be referred." This section again is a section referring to arbitrations generally, and not merely to arbitrations in respect of disputes referred to in s. 150; but if the arbitrations under that section had been intended to be, as it has been contended by the plaintiffs' counsel they are, arbitrations in which the arbitrators succeed to all the duties of the surveyor in the matter of the apportionment, and are bound to make an entirely fresh apportionment, binding when made upon all owners of premises liable to pay their proportion of the expenses of the work done, we cannot but think that the Act would have said so in plain terms; and would further have made some provision for giving the non-disputing owners notice of the arbitration, and an opportunity of protecting their interests in it. But when s. 180 is looked at, it is plain that its provisions are only calculated to protect the interests of the parties to a specific dispute, made the subject of the arbitration set on foot under s. 179, and the last sub-section of the latter section, when providing for the effect of the award, merely enacts that "the award of arbitrators or of an umpire under this Act shall be final and binding on all parties to the reference." It is said by the plaintiffs' counsel that the urban sanitary authority themselves represent the non-disputing owners, and can protect their interests; but practically this is impossible. Many an owner may have objections to a surveyor's apportionment, although he may be willing to pass them by sub silentio looking to the small proportion of the expenses which he is called upon to bear; but if that proportion were altered, and he were to be called upon to pay more, he might well determine to bring forward his objections; but how is he to exercise this option when he is ex concesso unaware that the apportionment is proposed to be altered, until it is done so by an award absolutely binding upon him? and how is the urban sanitary authority to represent and protect him in reference to objections arising from their own officer's apportionment, which he and they would naturally presume to be correct except in the particular matter made the subject of dispute? It appears to be admitted that every disputing owner may, and must, appoint an arbitrator, and that there must be as many separate arbitrations as there are disputing

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owners; and indeed, in the present case there were in form four separate arbitrations and four separate awards, although made by the same umpire. But, if so, which of these separate arbitrations and separate awards is to bind the non-disputing owners? And suppose, as might in theory at least be the case, awards given by different umpires and setting up different apportionments, what is to be done then? It really is no answer to this question to say that the umpire would in practice always be the same. The sections of the Act must be looked at and interpreted with reference to legal possibilities. Another difficulty in the way of the plaintiffs' contention occurs to us. Suppose that the day after the notice of the surveyor's apportionment is served, one of the owners charged disputes the apportionment, and he and the urban sanitary authority at once agree upon a single arbitrator. That arbitrator must, under the provisions of s. 180, make his award within two months. When, then, his award is made, the period of three months, within which owners may dispute the surveyor's apportionment, is still running; but, according to the plaintiffs' contention, the award is binding upon all owners, and consequently owners who intended, perhaps, to bring forward special objections of their own to the surveyor's apportionment, and objections which would equally apply to the arbitrator's apportionment, would, notwithstanding the currency of the period of three months, be shut out of any objection at all by virtue of an arbitration and award, of which they had no notice.

The difficulties indeed in the way of the plaintiffs' contention appear insurmountable: running counter as it does to well-established principles of law, it is at least to be required, before any Court should adopt it, that the language of the Act of Parliament, upon which reliance is placed, be clear and express upon the point; but it is impossible to say that such is the case here, and we prefer, under these circumstances, to follow the general law, rather than to interpret the language of the Act of Parliament in a manner contrary to the general law, in order to provide for a particular case, which it is quite possible may have escaped the attention of those who framed, and those who passed the Act. It is unnecessary for us to decide, what is the exact position of

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the sanitary authority in cases where the surveyor's apportionment is deranged by the action of one of the frontagers, or whether in such cases, and by a different mode of proceeding to that adopted in the present case, the sanitary authority can obtain from the frontagers generally, whether they may have paid or not the proportion originally assessed upon them, such payments as the alteration of the proportion in the case of a particular frontager might be supposed to render necessary in the case of all. It is sufficient for us to say that the defendant is not bound by an award in an arbitration to which he was not a party, and of which he had not even notice, and consequently that the claim of the plaintiffs, based as it is upon that award, fails.

Appeal allowed.

Solicitors for plaintiffs: *Sole, Turner, & Knight, for W. C. Cripps & Son, Tunbridge Wells.*

Solicitors for defendant: *Collyer-Bristow, Withers, & Russell, for Stone & Simpson, Tunbridge Wells.*

[IN THE COURT OF APPEAL.]

March 11.

CRUMP *v.* CAVENDISH.

Practice—Writ specially Indorsed—Rules of Supreme Court, 1875, *Order XIV., rules* 1, 3—*Leave to defend upon bringing the Sum claimed into Court.*

Where a summons has been issued under Order XIV., the defendant, if he makes no affidavit of merits, is not entitled as matter of right to defend the action upon offering to bring the sum claimed into court. A discretion is vested in the judge to decide whether, upon considering the other facts of the case, the defendant's offer is a sufficient ground for refusing the plaintiff's application.

THIS was an action to recover the sum of 39*l.* 14*s.* 2*d.* for goods sold to the defendant between April, 1873, and January, 1875. The writ of summons was issued upon the 6th of December, 1879. The defendant having appeared, the plaintiff took out a summons under Rules of the Supreme Court, 1875, Order XIV., rule 1, and at the hearing before the master produced an affidavit verifying the causes of action. The defendant did not shew cause against the plaintiff's application by any affidavit, but contended that as

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part of the plaintiff's claim appeared by the indorsement upon the writ to be barred by the Statute of Limitations, the defendant was entitled to defend without making any affidavit. The plaintiff relied upon certain letters from the defendant, as containing acknowledgments of the whole debt sufficient to defeat the operation of the Statute of Limitations. The master gave the defendant leave to defend. On appeal to Field, J., the defendant offered to bring the whole amount claimed into court, but the learned judge reversed the order of the master, and directed that the plaintiff should be at liberty to sign final judgment, unless 39*l.* 14*s.* 2*d.* should be paid to the plaintiff in a week. The defendant gave notice of motion to the Exchequer Division to set aside the order of Field, J., and for leave to defend the action on payment into court of the amount of the plaintiff's claim. At the hearing, the judges (Kelly, C.B., and Lopes, J.) were divided in opinion, and no order was made. The defendant appealed to this Court.

Reginald Brown, for the defendant. The order of Field, J., is bad in form. It is irregular to direct that the debt shall be paid to the plaintiff herself. The proper form of order would be to direct the money to be brought into court. Moreover, as a part of the plaintiff's claim was disputed, there was no power to order the whole amount to be brought into court: *Dennis* v. *Seymour*. (1)

[THE COURT intimated that the form of the order made by Field, J., could not be questioned.]

Then, upon the construction of the rules contained in Order XIV. (2), it is submitted the defendant is entitled to defend

(1) 4 Ex. D. 80.

(2) By Rules of the Supreme Court, May, 1877, Order XIV., rule 1 (the original rule being repealed), "Where the defendant appears to a writ of summons specially indorsed under Order III., rule 6, the plaintiff may, on affidavit made by himself, or by any other person who can swear positively to the debt or cause of action, verifying the cause of action, and stating that in his belief there is no defence to the action, call on the defendant to shew cause before the Court or a judge why the plaintiff should not be at liberty to sign final judgment for the amount so indorsed, together with interest, if any, and costs. A copy of the affidavit shall accompany the summons or notice of motion. The Court or a judge may thereupon, unless the defendant, by affidavit or otherwise,

without making any affidavit, upon bringing the amount claimed into court. The plaintiff has full security for the debt, if she succeeds in proving her claim, and no valid reason can be assigned why the defendant should not have an opportunity of establishing such defence as he may be able to prove.

[BAGGALLAY, L.J. The language of Order XIV., rule 3, is different from that of the Summary Procedure on Bills of Exchange Act, 1855 (18 & 19 Vict. c. 67), s. 2, which provides that the judge "shall . . . . give leave to appear to such writ and to defend the action on the defendant paying into court the sum indorsed on the writ." Under that statute the judge has no discretion; but the words of Order XIV., rule 3, are not imperative; and they allow a judge to exercise his discretion whether a mere offer to pay the amount claimed into court is sufficient to entitle the defendant to get leave to defend.]

It is submitted that the difference of language is not intentional, and that a judge has no more discretion under Order XIV., rule 3, than he has under the Summary Procedure upon Bills of Exchange Act, 1855, s. 2.

Holmes Poulter, for the plaintiff, was not called upon to argue.

BRAMWELL, L.J. This appeal must be dismissed. It cannot be a right construction of Order XIV. that the defendant may surmise that there is no defence, and yet by paying money into court keep the plaintiff until after the trial from obtaining that which is admittedly due to her. I think that Order XIV. will not bear the interpretation contended for on behalf of the defendant. The words of rule 3 are "may shew cause . . . . by offering to bring into court the sum indorsed," that is, may urge as one reason why he should have liberty to defend the

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satisfy the Court or a judge that he has a good defence to the action on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend, make an order empowering the plaintiff to sign judgment accordingly."

By Rules of the Supreme Court, 1875, Order XIV., rule 3, "The defendant may shew cause against such application by offering to bring into Court the sum indorsed on the writ or by affidavit. In such affidavit he shall state whether the defence he alleges goes to the whole or to part only, and, if so, to what part, of the plaintiff's claim."

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action. They do not mean that upon an offer of that kind a judge is bound to refuse the plaintiff's application. To bring the sum claimed into court is a circumstance connected with the defendant's case, which no doubt a judge is bound to take into his consideration; but it is not decisive in the defendant's favour. He is bound to shew that he has some reasonable ground of defence to the action. It is very plain to me that the appeal must be disallowed.

BAGGALLAY, L.J. I think that it was intended to give a discretion whether, upon bringing into court the sum claimed, the defendant ought to have leave to defend. There may be good grounds for allowing the plaintiff to obtain payment of the debt at once.

THESIGER, L.J. I agree with the view taken by the other members of the Court. The object of Order XIV. was to prevent delay in obtaining payment of a just claim. The contention urged on behalf of the defendant is erroneous. The words "may shew cause" imply that a discretion is vested in the judge who hears the summons. He has to form an opinion as to the facts before him, and he is to stay his hand only if he is satisfied that the defendant has a good defence on the merits, or thinks the facts disclosed by the defendant sufficient to entitle him to be permitted to defend the action. In many cases the offer to bring money into court is a sign of the existence of such facts, if not of a good defence; but not in all.

Appeal dismissed.

Solicitors for plaintiff: *Hunter & Downes.*
Solicitors for defendant: *F. Heritage & Co.*

THE OVERSEERS OF THE POOR OF THE PARISH OF LIVERPOOL, APPELLANTS; THE VISITORS OF THE COUNTY LUNATIC ASYLUM OF LANCASTER AND THE JUSTICES OF THE PEACE FOR THE COUNTY OF LANCASTER, RESPONDENTS.

1880
April 13.

Poor—Pauper Lunatic—Lunatic Asylums Act, 1853 (16 & 17 *Vict. c.* 97), *s.* 80—*Adjudication of Settlement—Liability of Parish to remove from Asylum.*

When the visitors of an asylum have ordered a pauper lunatic confined therein to be discharged therefrom under s. 80 of the Lunatic Asylums Act, 1853 (16 & 17 Vict. c. 97), the overseers of the parish from which the lunatic was sent to the asylum are bound under that section to remove him to their parish, although it has been adjudged that the lunatic was not settled in that parish and that it could not be ascertained in what parish he was settled.

SPECIAL CASE stated by consent and by a judge's order under 12 & 13 Vict. c. 45.

On the 11th of March, 1878, Thomas Noon was taken to the workhouse of the parish of Liverpool by the police, having been found wandering in the streets of that parish, and on the 13th was, pursuant to the Lunatic Asylums Act, 1853 (16 & 17 Vict. c. 97), duly transferred as a pauper lunatic to the County Lunatic Asylum at Lancaster, under a justice's order. On the 30th of May following an order of justices was duly made under s. 98 of that Act, adjudging that the lunatic was not settled in the parish of Liverpool, that it could not be ascertained in what parish, township, or place he was settled, and that he was legally chargeable as a pauper lunatic to the county of Lancaster. The visitors of the asylum afterwards duly made an order for the discharge of the lunatic from the asylum, having duly served the overseers of the parish of Liverpool with notice of their intention to do so. The overseers were requested to remove the lunatic, but refused to do so, and on the 19th of October, 1878, were summoned before the justices at Lancaster at the instance of the visitors under s. 80 of the Act, for such refusal, when they urged that s. 80 was not applicable, on the ground that the lunatic had been adjudged to be a lunatic not settled in the parish of Liverpool and not having an ascertainable settlement elsewhere, and had been down to the time of the order of discharge detained in the asylum under the order of the 30th of May.

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The lunatic still continued to be chargeable to the county in pursuance of that order, and was still of unsound mind and not fit to be at large, but at the time of the order of discharge, and still, was, fit to be removed to and confined in the lunatic wards of a workhouse.

The justices being of opinion that the visitors were entitled to discharge the lunatic and to give the notice thereof, and that the overseers were not entitled to refuse to remove the lunatic, and that the case came within s. 80, convicted the overseers in a penalty of 20*s.*, whereupon they appealed under s. 128.

If the Court should be of opinion that the overseers were bound to remove the lunatic in pursuance of the notice, the conviction was to be affirmed; if, of a contrary opinion, to be quashed.

W. Graham, for the appellants. The overseers did not think it right to burden the parish with the expense of the lunatic without a decision of the Court. Under s. 98, if a pauper lunatic be not settled in the parish by which he is sent to an asylum he may be adjudged by the justices to be chargeable to the county. By s. 79, any three visitors of an asylum may discharge a pauper lunatic from the asylum. Sect. 80 (on which the question in the case turns) (1), only applies to a case where it has been adjudged that a lunatic is settled in a parish, for the words "or if no such adjudication shall have been made," cannot include a case where there has been an adjudication. Here there has been an adjudication that the lunatic was not settled in the parish of Liverpool,

(1) Sect. 80 of the Lunatic Asylums Act, 1853, (16 & 17 Vict. c. 97): "When the visitors of any asylum shall order a pauper lunatic confined therein to be discharged therefrom, it shall be lawful for them, when they shall see occasion, to send notice in writing signed by their clerk, through the post or otherwise, of their intention to discharge such lunatic, to the overseers of the parish wherein it shall have been adjudged that such lunatic is settled, or if no such adjudication shall have been made to the overseers of the parish from which such lunatic shall have been sent to such asylum, unless such lunatic shall be chargeable to the common fund of any union, and in any such last-mentioned case to some one relieving officer of such union; and upon receipt of such notice the overseers or relieving officers respectively shall cause such lunatic, upon his discharge, to be forthwith removed to their parish or to the workhouse of the union at the cost and charge of their parish or of the common fund of the union as the case shall require;" under a penalty not exceeding 10*l.*

and the case therefore does not, in the appellant's view, fall within s. 80. There is a further difficulty in seeing what funds are to be applied to his maintenance, for under s. 95 he is chargeable to the parish of Liverpool only until the parish has established "that such lunatic is settled in some other parish, or that it cannot be ascertained in what parish such lunatic is settled." Here there has been an adjudication that it cannot be ascertained in what parish the lunatic is settled, and thereupon he ceased to be chargeable to the parish of Liverpool.

R. S. Wright, for the respondents, was not heard.

KELLY, C.B. I think the language of s. 80 of the Act is quite clear, and gives rise to no difficulty. If a lunatic has been adjudged to be settled in a parish that parish must upon due notice remove him from the asylum; if not, the parish from which he was sent to the asylum must remove him. That is the case here, the lunatic not having been adjudged to be settled in any other parish, the parish of Liverpool, from which he was sent to the asylum, must remove him. The conviction therefore was right.

HUDDLESTON, B., concurred.

Conviction affirmed.

Solicitors for appellants: *Monckton, Long, & Co.*
Solicitors for respondents: *Bower & Cotton.*

1880
Jan. 28.

[IN THE COURT OF APPEAL.]

THE ATTORNEY GENERAL *v.* THE METROPOLITAN DISTRICT RAILWAY COMPANY.

Practice — Evidence by Affidavit or Orally — Rules of Equity Exchequer, 14th March, 1866, X. 2, 3.

An information was filed on the Equity side of the Exchequer Division to recover passenger duty from a railway company, the question in dispute being whether certain trains run by the company were cheap trains, within the meaning of the Act exempting from passenger duty the fares for the conveyance of passengers at fares not exceeding one penny per mile by cheap trains. The company applied to have the evidence taken orally :—

Held, reversing the decision of the Exchequer Division, that the evidence ought to be taken orally, as it was desirable that in such a case the Court should be able to obtain immediate information and explanations by putting questions to the witnesses.

Information on the Revenue side of the Exchequer Division to obtain payment from the defendants of duty under 5 & 6 Vict. c. 79, from which the defendants claimed exemption under 7 & 8 Vict. c. 85.

The information stated the provisions of the Act 5 & 6 Vict. c. 79, imposing a duty on sums received from the carriage of railway passengers. It then stated s. 6 of 7 & 8 Vict. c. 85, obliging every railway company to run daily at least one cheap train complying with the conditions therein mentioned, and s. 9, exempting from tax the fares for the conveyance of passengers carried at fares not exceeding 1*d.* per mile by such cheap trains. It then referred to 21 & 22 Vict. c. 75, further regulating the fares by cheap trains. It then referred to 26 & 27 Vict. c. 33, s. 13, defining what trains should be within the exemption of s. 9 in the first mentioned Act. It then stated that the defendants ran passenger trains at frequent intervals through the day, all of which contained first, second, and third class carriages, and stopped at every station. That the fares did not vary at every station on the line, and in some cases the third class fares were below and in some above the parliamentary rate. That the defendants, in addition to the third class tickets issued by them, also issued tickets which they called third class parliamentary

tickets at the parliamentary rate, but that they only issued at each station two parliamentary tickets for each station on the line by any one train. That such two parliamentary tickets were issued for those stations to which the ordinary third class fare exceeded the parliamentary rate, and that the defendants refused to issue from any one station for any one train more than two tickets at the parliamentary rate for those stations to which the ordinary third class fare exceeded the parliamentary rate. That the company claimed exemption from duty for all fares charged for third class tickets issued by them where the fare did not exceed the parliamentary rate, on the ground that these trains were cheap trains within the meaning of the exemption. That the defendants also alleged that they ran workmen's trains at a penny fare for the entire journey, and claimed exemption from duty in respect of such fares. The information alleged that tickets by these trains were issued to workmen only. That no luggage other than workmen's tools was allowed, and that the Board of Trade had not dispensed with the conditions as to luggage contained in 7 & 8 Vict. c. 85. The information claimed duty on all the fares received from passengers on the defendants' line.

The answer of the company to the original information contained the following statements:—

4. "The defendant company do refuse to issue from any one station for any one train more than two tickets at the parliamentary rate for every one of those stations to which the ordinary third class fare exceeds the parliamentary rate. After two tickets at the parliamentary rate have been issued, for instance, at the Temple for Westminster Bridge by any one train, no more parliamentary tickets would be or are issued at the Temple for Westminster Bridge for that train, but it is not the fact that not more than two passengers could travel by that train at the parliamentary rate from the Temple to Westminster Bridge, inasmuch as all passengers who had obtained parliamentary tickets previously on the same day, whether at Temple station or at Blackfriars, or at Mansion House, or all of them, to all or any of the other stations of the defendant company's railway, could and can travel by that train.

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5. "The practice of the defendant company with respect to the issue of parliamentary tickets is as follows: There is not any restriction by which only two parliamentary tickets can be issued at any one station for each train. By each train throughout the whole day two parliamentary tickets are issued to each other station on the defendant company's railway." The defendants then proceeded to shew at length that the total number of parliamentary tickets which could thus be issued for each train was 128, the total third class accommodation in each train being 178. That they issued parliamentary tickets for 430 trains each day, and that the total number of passengers who could travel by parliamentary tickets in the course of a day was 94,366, exclusive of passengers by workmen's trains.

6. "By means of the arrangement and practice hereinbefore set forth, accommodation is provided for the holders of parliamentary tickets by every train all through the day to the extent of about two-thirds of the third class capacity of the train."

7. That the company moreover ran workmen's trains at 1*d.* fare for the whole journey, such trains conveying on an average 4255 per day.

8. "Unless the limit hereinbefore appearing were placed by the defendant company on the issue of parliamentary tickets, the trains at certain hours of the day would be completely occupied by parliamentary passengers, to the exclusion of every other class of the public.

9. "The defendants submit that, as hereinbefore appears, the defendant company do provide, and have at all times material to this information always provided, on every such day except Christmas Day and Good Friday, in all reasonable and necessary ways for the conveyance of third class passengers in accordance with the obligations of the Cheap Trains Act."

10. The company claimed exemption from duty on all third class fares not exceeding the parliamentary rate, on the ground that all their trains were cheap trains within the meaning of the Act.

17. That the defendants in rendering their accounts had charged themselves with and paid passenger duty in respect of all fares above the parliamentary fares.

The answer to the amended information contained the following statements:—

1. "The subjoined table sets forth the number of parliamentary tickets which have in fact been issued by the defendant company for each month since the 4th of February, 1876, to the end of June, 1878, and also the number of other passengers carried for each month within the same period."

2. The company referred to paragraphs 4 and 5 of their former answer, and submitted that their trains were cheap trains, because they stopped at each station and conveyed passengers to and from every station at fares not exceeding the parliamentary rate, and in other respects complied with such of the conditions of the Cheap Trains Act as had not been dispensed with by the Board of Trade.

3. "It is not the fact that tickets for workmen's trains are issued to workmen only, but to the public generally desiring to go by such trains, and there is no restriction as to the luggage which parties travelling in workmen's trains are allowed to carry."

The defendants, after issue had been joined, took out a summons for an order that the evidence as to the facts alleged in the above paragraphs of their answers should be taken vivâ voce at the hearing. (1) The application was heard by Lindley, J., at

(1) Rules of Court of the 14th of March, 1866.

Rule X. 2. "The informant or any defendant may at any time after issue has been joined in a cause, apply to a judge by a summons to be served on the opposite party for an order that the evidence as to any facts or issues (such facts and issues to be distinctly and concisely specified in the summons) may be taken vivâ voce at the hearing of the cause, and the judge may, if he shall so think fit, make an order that the evidence as to such facts and issues, or any of them, shall be taken vivâ voce at the hearing accordingly, and the facts and issues as to which any such order shall direct that the evidence shall be taken vivâ voce at the hearing shall be distinctly and concisely specified in such order. And where any such order shall have been made the examination in chief, as well as the cross-examination and re-examination shall be taken before the Court at the hearing as to the facts and issues specified in such order, and no affidavit shall be admissible at the hearing in respect of any fact or issue which shall be included in any such order as aforesaid.

3. "Except as to facts or issues included in any order directing evidence to be taken vivâ voce at the hearing under the first clause of this rule each party shall be at liberty to verify his case by affidavit."

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chambers and refused. The defendants appealed to the Divisional Court.

Dec. 4, 1879. *E. Clarke*, for the defendants. There will be no dispute as to the number of tickets issued, such a matter as that could well be proved by affidavit, but the defendants are anxious that the officials of their line should be in a position when the question is discussed to give evidence as to the practical effect of the company's regulations.

W. W. Karslake, for the Crown. This is the first application ever made to take evidence vivâ voce under this rule. There cannot be any such dispute about facts as to make oral evidence necessary. The questions will turn upon inferences to be drawn from a mass of figures which can be much better considered if they are put down by an affidavit in black and white, so that they can be examined by the parties before the hearing. The intention of the rules was to follow the practice of the Court of Chancery of that day, as being well suited to the class of cases which came before the Court in these informations, and some reason ought to be shewn for taking the case out of the general rule.

E. Clarke, in reply. The defendants are ready to give any information as to the statistics of the company that may be required before the trial, and have no wish to take the informant by surprise as to figures, but it is most important that they should be able to shew by the evidence of their officials what is the effect of the system adopted. It is hardly possible to frame affidavits so comprehensive as to meet every case which might be suggested by the argument on behalf of the Crown.

KELLY, C.B. I cannot think that this order of the learned judge ought to be interfered with. If there were any species of evidence upon which there could be so much difference of opinion as to the inferences to be drawn from it as to involve questions depending upon the merits of the case, it really might be different, but I do not see why anything that a witness, called on behalf of the defendants, could depose to as to inferences to be drawn from certain facts and certain practices of the company cannot be put upon affidavit, just as well as in the shape of oral evidence at the trial. I think it would be imposing upon the judge who

tries the cause a multiplicity of figures and a multiplicity of statements as to the inferences to be drawn from those figures, which there would be no checking, and no limiting of any argument on the one side or the other side, as to what the figures were. What the practice of the railway company is with respect to numbers of passengers, or what the fact is with respect to the numbers of passengers of one class and one description and another, could be just as well put on affidavit as elicited by vivâ voce examination. I think it would be unduly lengthening the cause and creating difficulties in the cause, and as the whole matter, the affidavits and the answers to affidavits, if prepared, if it were in black and white, would be entirely sufficient, I think the order ought to stand.

STEPHEN, J. I will say no more upon this matter than that I do not see my way to interfere with the discretion exercised by the learned judge.

The defendants appealed.

Jan. 28, 1880. *Bray*, for the defendants, was stopped.

W. W. Karslake, for the Crown. The practice on the Revenue side of the Exchequer Division being saved by the Judicature Act the case is to be decided according to the practice established in that division.

[JESSEL, M.R. That practice has not been abolished, but it must be worked with reference to the principle established by the Judicature Act, that oral evidence is to be had where there is no special reason to the contrary.]

The statistics are best given by affidavits, and there is no such dispute of fact as to make it necessary or desirable to have oral evidence. The case is one where the Court of Appeal will not interfere with the discretion of the Court below: *Shrubsole* v. *Schneider*. (1)

JESSEL, M.R. The question raised on this appeal involves to a certain extent the construction of the rules which still govern

(1) 4 De G. J. & S. 52.

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the practice of the Exchequer Division as regards Revenue causes. The third rule of the Chancery Orders of the 5th of February, 1861, which was adopted by the Exchequer rules of 1866, and of course is now binding on the Exchequer Division, is in part as follows: [His Lordship read Rule X. 2 of the Exchequer rules.] It must be remembered that at the time when this order was made the practice in the Court of Chancery and on the Equity side of the Court of Exchequer was not to take evidence vivâ voce, unless in certain exceptional cases. There was therefore a very good reason then, for making a special order to enable the Court to take evidence in that way. But since the passing of the Judicature Act the High Court can always take evidence vivâ voce, and not only can it always do so but, looking at the rules which are part of the Act of 1875, it clearly was the intention of the legislature that the evidence in every case of really disputed facts should be taken orally, unless the parties consented to its being taken otherwise, or there were exceptional circumstances. The state of things which gave rise to this order has therefore passed away, and instead of its being necessary to shew a special reason for departing from the old Chancery practice, it now lies upon the party desiring to proceed according to that practice to shew a special reason for departing from the present general practice. In other words the prevailing theory as to the way in which contested questions of facts should be tried is altogether changed, and I think we ought to have regard to that change in the spirit of legislation in deciding how to exercise a discretion under this order. It appears to me that, having regard to the present state of the law with regard to evidence, the judge should in every case of contested or disputed fact coming on to be tried take the evidence orally, unless some good reason to the contrary is shewn.

In this case I am bound to add that even under the old practice I should have ordered the evidence to be taken orally. It is true that there is no great dispute about the facts, because they must be known to the officials of the company, and they cannot be known to the informant, still there is some dispute; but the main reason why I should come to the conclusion that in this particular case the evidence ought to be taken orally is this, that

the case relates to the practice of a railway company. Now when officials give evidence as to that practice it constantly happens (I speak from my own personal experience in this matter, for I have tried several such cases) that the judge himself wishes to ask questions and to obtain explanations. These can be got readily when the witness is in the box, he can make that clear which an affidavit often leaves ambiguous, sometimes by accident and sometimes purposely. Not only is there great difficulty in ascertaining the truth when the witness is not present, but when, after a discussion has taken place before the judge, a further affidavit is required, there is some danger of the evidence being made to fit the circumstances, so as to be most advantageous for the party giving it, which cannot happen when the questions are asked of witnesses in the box. It appears to me, therefore, that in addition to the application of the general principle there are in this case special circumstances which make it, speaking with the greatest respect to the Court below, eminently desirable that the evidence should be taken orally, therefore I think the appeal ought to be allowed.

BAGGALLAY, L.J. If I had felt satisfied that a discretion had been exercised by the learned judge with reference to all the peculiar circumstances of the case, I should have felt considerable hesitation in reviewing or dissenting from a discretion so exercised. It is stated, however, that Lindley, J., in dismissing the summons, went upon the ground that the evidence was to be taken by affidavit, unless some special case was made by the party applying that it should be taken orally; he therefore proceeded, not altogether in the exercise of a discretion applicable to the particular circumstances of the case, but upon a principle in which I cannot altogether concur. I do not go so far as to say that in a contested case, where one party desires the evidence to be taken orally, and the other side desires it to be taken by affidavit, the evidence ought primâ facie to be taken orally. I think that both views of the case should be present to the mind of the judge, and that he should decide between the one mode and the other, having regard to all the circumstances.

Having regard to all the circumstances of this case, I entertain

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a very decided opinion that there would be a great advantage in having the evidence taken orally, and, amongst others, for the reason mentioned by the Master of the Rolls, that in the course of a trial of this kind, when you have witnesses who in a sense are experts, for they are speaking as to the practice of a particular company, it is a great advantage to the judge, and through him to the suitors, that he should have an opportunity of obtaining information with regard to various matters, which information he can readily obtain when the witnesses are before him, but which he cannot obtain when their evidence is taken upon affidavit.

COTTON, L.J. I am very unwilling, in the Court of Appeal, to interfere with an order made by the Court below in the exercise of a discretion given to that Court; but if the Court below has proceeded on a wrong principle, it is the duty of the Court of Appeal to interfere. Here, as I understand, the Exchequer Division decided the case on the ground that under the rules the evidence was to be by affidavit, except where from the nature of the issues joined between the parties the matter was so far in conflict that the Court could not decide where the truth lay, unless it had the witnesses before it and could judge of their evidence by hearing and seeing them. In my opinion that is not a correct view of the rules. Affidavit evidence should primâ facie be given in all those cases where there is no real conflict of fact, and where no explanation of facts is necessary in order to enable the Court to come to a decision: that is to say, where, though the parties do not admit the facts alleged on the one side or on the other, and it is therefore necessary that the Court should have the statements verified by something beyond the mere allegation of the parties, there is no conflict of evidence. But, in my opinion, evidence should be taken orally in other cases besides those to which the Judges of the Exchequer Division refer, and in such a case as this, where it is desirable to have not only mere verification of statements, but explanation, so as to enable the Court properly to understand what it is on which either party relies, the evidence should, in my opinion, be given orally; because then you can test and examine what the witness means by asking him questions, and this you cannot do if his

evidence is put into an affidavit settled by his solicitor or counsel, and comes out, not as the statement of the witness of what he knows and what he desires to express as the fact, but as the view which his solicitor or counsel takes of those statements which are made to him. In the present case I should have thought that the Attorney General would have desired that the evidence should be vivâ voce, in order that he might have an opportunity of testing what was said by the witnesses after having heard the exact words used, and in order that he might, if necessary, have an opportunity of getting a proper explanation as to what those words were and a proper explanation of what the witnesses stated.

As regards the question before the Court, in my opinion, we are justified in interfering, in consequence of the Court below having proceeded on a wrong principle, and I think it a case where it is proper that the evidence should be given, not by affidavit, but orally.

Judgment reversed.

Solicitors for the Crown: *Solicitor of Inland Revenue.*
Solicitors for defendants: *Baxters & Co.*

[IN THE COURT OF APPEAL.]

Feb. 18, 25.

THE ALINA.
BROWN *v.* THE ALINA.

Admiralty Jurisdiction of County Courts—Breach of Charterparty—County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 *Vict. c.* 71), *s.* 3—*County Courts Admiralty Jurisdiction Amendment Act*, 1869 (32 & 33 *Vict. c.* 51), *s.* 2.

The 2nd section of the County Courts Admiralty Jurisdiction Amendment Act, 1869, gives the county courts jurisdiction in cases of claims arising out of charter-parties or other agreements for the use or hire of ships, although the Court of Admiralty may have no original jurisdiction in such cases.

Cargo ex Argos (Law Rep. 5 P. C. 134) followed.

Simpson v. *Blues* (Law Rep. 7 C. P. 290) and *Gunnestad* v. *Price* (Law Rep. 10 Ex. 65) disapproved.

THIS was an appeal from an order of the Divisional Court consisting of Kelly, C.B., and Stephen, J., granting a writ of

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prohibition to the judge of the county court of Yarmouth against further proceedings in an action against the Russian ship *Alina*.

The action in the county court was commenced on the 28th of October, 1879, by H. Brown & Co. against the *Alina* for breach of a charterparty signed by the master of the *Alina*, by which the ship was to proceed to Cronstadt, there load a cargo of timber, and proceed to a port in England and deliver the cargo for freight. The plaintiffs alleged that the vessel proceeded to Cronstadt, but the master refused to take on board the cargo provided by the plaintiffs, who were consequently obliged to charter another ship; and they laid their damages at 300*l*.

An appearance was entered on behalf of the master. The ship was arrested on the 1st of November, 1879, and still remained under arrest.

The defendant applied to Denman, J., in chambers for a writ of prohibition to restrain the county court from proceeding in the action, and his lordship granted the writ. The plaintiffs then appealed to a Divisional Court of the Court of Exchequer.

The case was heard before Kelly, C.B., and Stephen, J., on the 20th of December, 1879, and the Court affirmed the decision of Denman, J.

The plaintiffs appealed from this decision to the Court of Appeal.

Cohen, Q.C., and *Aspinall*, for the plaintiffs. The question turns entirely upon the construction of the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), and the County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 Vict. c. 51), s. 2. The 3rd section of 31 & 32 Vict. c. 71, gives jurisdiction to the county courts in certain matters, in the Act referred to as Admiralty causes, namely, claims for salvage, towage, necessaries, wages, damage to cargo, and damage from collision, where the claim does not exceed a certain amount. In the 26th section a power of appeal is reserved to the Court of Admiralty, and by the 6th section the Court of Admiralty may on motion by any party to an Admiralty cause pending in a county court transfer the cause to the Court of Admiralty. Then, by the 2nd section of 32 & 33 Vict. c. 51, the jurisdiction of the

county courts was enlarged, and it was enacted that the county courts should have jurisdiction to try causes, "As to any claim arising out of an agreement made in relation to the use or hire of any ship, or in relation to the carriage of goods in any ship, and also any claim in tort in respect of goods carried in any ship provided the amount does not exceed 300*l.*" This section enlarged the Admiralty jurisdiction of the county courts, so that they are now able to entertain causes arising out of breach of charterparties, although such causes are not within the class of Admiralty causes referred to in the Act of 1868, and are not originally cognizable by the High Court of Admiralty. There have been conflicting decisions upon this question. In *Simpson* v. *Blues* (1) the Court of Common Pleas held that the latter Act was not to be construed so as to confer jurisdiction on the county courts in causes other than "Admiralty causes" within the definition of the Act of 1868, and that decision was followed in *Gunnestad* v. *Price*. (2) But in *The Cargo ex Argos* (3) the Privy Council held that the words of the Act of 1869 were unambiguous, and gave jurisdiction to the county courts in causes arising out of charterparties, even though the Admiralty Court had no original jurisdiction in them. This decision is in accordance with the true construction of the Act. There is nothing ambiguous in the words of the section, nor does this interpretation of it lead to any absurd result. There is nothing absurd in supposing that the legislature intended to give the county court jurisdiction over a larger class of cases, accompanied as it is by the power of proceedings in rem, than are enjoyed by the Admiralty Court, provided the matters in dispute are of small amount. Jurisdiction in matters arising out of charterparties was originally claimed and exercised by the Admiralty Court, although that exercise was so constantly resisted by the Common Law Courts that by degrees it was abandoned; Abbott on Shipping, p. 116; *De Lovio* v. *Boit* (4); *The Volunteer* (5); Kent's Commentaries, vol. 1, p. 368; Parson's Law of Shipping, vol. 2, p. 174. There is nothing unreasonable in its being now partially restored.

(1) Law Rep. 7 C. P. 290.
(2) Law Rep. 10 Ex. 65.
(3) Law Rep. 5 P. C. 134.
(4) 2 Gallison (Amer.) 398.
(5) 1 Sumner (Amer.) 551.

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Herschell, Q.C., and *Wood Hill*, for the respondent. The reasoning in the judgments in *Simpson* v. *Blues* (1) and *Gunnestad* v. *Price* (2) is conclusive. The construction contended for by the plaintiffs would lead to strange anomalies, namely, that the inferior Court would have a wider jurisdiction than the superior Court to which an appeal lies, that the Appellate Court would have an appellate jurisdiction where it has no original jurisdiction, and that it would be able to acquire a jurisdiction in cases in which it had no original jurisdiction by transferring causes from the county court. It is also unreasonable to suppose that the legislature intended to give to the county court the power of arresting the ship, which follows upon the admiralty jurisdiction, and on the other hand to deprive the parties of the benefit of a jury, without express words to that effect. The words of the Act of 1869 are in themselves ambiguous, for the expression "in relation to the use or hire of a ship" are so wide that they must have some kind of qualification, and the true interpretation must be sought by reading the two Acts together, and finding from them the intention of the legislature. The reasonable qualification is that the claim must arise in any cause now cognizable by the Court of Admiralty: *The St. Cloud.* (3)

JESSEL, M.R. The question which we have to decide cannot be treated as an easy one, inasmuch as it has given rise to such a conflict of decisions; but when we apply to this clause in the Act of Parliament the well-established rules of construction, I must say, speaking for myself alone, that it does not appear to me to be so very difficult a question as to have necessarily caused so much conflict of opinion. The rule of construction, as laid down in all the cases, and notably in the House of Lords, is this, that where you have plain terms used in the enacting part of an Act of Parliament, nothing less than manifest absurdity will enable a Court to say that the ordinary and natural meaning of the terms is not the true meaning. Where there are two or more readings possible, that is, where there is ambiguity, there of course you let in arguments of much less strength; in such cases arguments as to

(1) Law Rep. 7 C. P. 290. (2) Law Rep. 10 Ex. 65.
(3) Bro. & Lush, 4.

inconvenience, and arguments as to the more useful or more likely interpretation, may be fairly considered. Therefore it appears to me that we must first determine whether the words are in themselves unambiguous, and if we arrive at that conclusion, then whether there is any such manifest absurdity as will enable a Court of construction to say that the natural meaning of the words could not possibly be the meaning intended by the legislature to be put upon them.

Now, first of all as to the words themselves. The Act is called "An Act to amend the County Courts Admiralty Jurisdiction Act, 1868, and to give jurisdiction in certain maritime causes." If you judge by the title, it certainly extends to giving fresh jurisdiction in certain maritime causes. The 2nd section is as follows: "Any county court appointed or to be appointed to have Admiralty jurisdiction shall have jurisdiction, and all powers and authorities relating thereto, to try and determine the following causes:—as to any claim arising out of any agreement made in relation to the use or hire of any ship, or in relation to the carriage of goods in any ship, and also as to any claim in tort in respect of goods carried in any ship, provided the amount claimed does not exceed 300*l*." I am at a loss to see any ambiguity in those words. An agreement in relation to the use or hire of a ship must include a charterparty. It would be difficult to define a charterparty otherwise than as coming within those terms. In fact, it is very often so defined. I see no doubt or difficulty, as far as I am concerned, in reading the words in their proper sense and they do appear to me to be quite clear. I am very glad on this point at all events to see that, with one exception, the judgments of all the judges who have given an opinion or decision upon this section are unanimous, though the exception is one of great weight and importance.

In the case of *Simpson* v. *Blues* (1), where there were four judges, Justices Willes, Byles, Brett, and Grove, no one alleged, although something of that kind had fallen from Justice Willes on a previous occasion, that the words were anything but clear in themselves, and the ground of the decision was totally different. In the case in the Privy Council again, *The Cargo ex Argos* (2),

(1) Law Rep. 7 C. P. 290. (2) Law Rep. 5 P. C. 134.

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we have four judges present, being the four ordinary judges of the Privy Council, and all four agreed that the words were clear. Then when the case came again before a common law court, in *Gunnestad* v. *Price* (1), there were only two judges present, Baron Cleasby and Baron Bramwell. Baron Cleasby does not state the words to be otherwise than clear in themselves, but I admit that Baron Bramwell does, and he says that he considers them ambiguous. Now, therefore, we have only one judge who considers them ambiguous. Whether or not they are ambiguous is a question of course not to be lightly passed over with the opinion of Baron Bramwell the other way, and therefore I wish to say a word or two on the grounds which induced him to think them ambiguous.

He says this: "The words are 'claim arising out of any agreement in reference to the use or hire of any ship,' not 'claim arising out of any agreement for the use or hire of any ship.' I cannot think that the enactment is in plain and intelligible language free from ambiguity. If I found the words without anything to control them or guide me in their interpretation I should say they included the cases before us and much more. But as it is, I declare I do not know what they mean or were intended to mean. A charterparty is not an agreement for the use or hire of a ship, but it is said to be included in the words 'claim arising out of any agreement made with reference to the use or hire of any ship.' Would that include a shipbroker's claim for finding a charter?" Then he says: "Take the next words, 'Claim arising out of any agreement in relation to the carriage of goods in any ship,' does that include a claim on a policy of insurance? Some restriction must be put upon the words." Now it appears to me first of all that there is some slip about the charterparty. A charterparty certainly is an agreement for the use or hire of a ship, and consequently the ambiguity which the learned Baron is there speaking of is one of his own creating. He does not doubt for a moment that a charterparty would be included under the terms; what he doubts is whether something else not before him would be included under the terms. Therefore there was no ambiguity

(1) Law Rep. 10 Ex. 65.

as regards the case then to be decided; the words did include it. The supposed ambiguity relates to something totally different—a shipbroker's claim for finding a charter or a claim on a policy of insurance. It will be time enough, therefore, to consider whether or not those things are included in the words when the case arises. But when you come really to examine Baron Bramwell's opinion, he does not dispute that the words will include a charterparty, subject to the correction which I have ventured to make in his definition of the term charterparty. So that one may consider substantially that all the judges are agreed that the words are clear.

Well, now, if the words are clear are there other words in the Act of Parliament to shew that they have a different meaning? That is not suggested, but what is suggested is that by reason of the literal interpretation of the 3rd section great inconvenience will follow, great alteration of the law will be made, and that those inconveniences are such as should induce the Court to control the plain meaning of the words.

Now, unless those inconveniences amount to manifest absurdity, it appears to me the law does not allow any such control to be exercised over the plain words of an enactment by a Court of construction, and consequently that the judgments given by the Court of Common Pleas, and with one exception again the judgments given by the Court of Exchequer, could not be supported in point of law, because all that was relied upon was inconvenience. But I again admit that there is the exception in the case of Baron Bramwell. He does put it on what appears to me a true legal ground, manifest absurdity—and it only remains for me to consider whether there is any such manifest absurdity. That I am not misinterpreting the reasons given in the judgment in the Common Pleas is plain, I think, from a very few words of the judgment itself. I nowhere find in the elaborate judgment delivered by Mr. Justice Brett anything like the word "absurdity," or words equivalent to it in any shape or way. What he says at page 296 is this: "These considerations lead, we think, to the conclusion that we ought not so to construe the words of these County Court Acts as to create this large novel and inconvenient jurisdiction, when we find from the context that the

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general intention was only to distribute the Admiralty jurisdiction by allowing suits of limited amount to be instituted in inferior Courts." And when we look in detail into his reasons, his reasons are these. First he says: "The Admiralty Court is the Court of Appeal, and it has no jurisdiction to entertain these causes in the first instance." Now to my mind that is not a good reason either on the ground of inconvenience or otherwise. It has frequently happened that the Court of Appeal has no original jurisdiction, and it has not unfrequently happened that even when the Court of Appeal has an original jurisdiction of its own, it has no original jurisdiction in respect of the matters as to which the appeal is given, nor is there in that respect any argument from inconvenience, because the Court of Appeal may be a very good Court of Appeal and not a good Court of original jurisdiction.

Then the next ground is this, that there is a power of transfer in different cases from the county court to the Admiralty Court. Well I will assume for this purpose that the power of transfer applies to these particular cases. Then it is said that the result will be to give to the then Admiralty Court, at its will and pleasure, a new jurisdiction, which it did not possess at the time the Act passed. I am not very much impressed by that argument. In the first place, it is not to be presumed that the Admiralty Court will transfer causes, except in the case in which the legislature intended the causes to be transferred—cases of such peculiar difficulty that they ought to tried in the first instance by the Admiralty Court, and, therefore, there will be no arrogation of jurisdiction, except where it was conferred by the legislature. Then it is said, why confer that jurisdiction on the Admiralty Court? I do not know that there is any objection to it. When the Act was passed the Admiralty Court took evidence, and conducted its proceedings very much in the same way as the common law courts. There might be some trifling differences, but substantially justice was administered very much in the same way. What inconvenience would arise by giving this jurisdiction to the Admiralty Court? The only suggestion we have heard is that the plaintiff might not get a jury or the defendant might not; but the answer was very simple. It does not follow that that was considered

an evil by the legislature. We know perfectly well that by the comparatively recent Judicature Act, that very option is given to a plaintiff of going to a Division where there is no jury, instead of to a Division where there is a jury.

Therefore, I cannot see that there is any strong argument to be adduced from the legislature having done that partially only which it has since done to a very great extent.

Those are two objections. The third objection is this, that looking at the 3rd section of the Amendment Act, the jurisdiction is conferred on the county court to proceed in rem, thereby enabling the county court to arrest a ship in cases where, before the passing of the Act, the ship could not be arrested. Well, there again I am at a loss to see the inconvenience. It might have been considered by the legislature to be of very great importance that in these cases you should have the power to arrest a ship. Inconsistency there is, and that is really a part of the argument. It is inconsistent that the county court can arrest the ship where the claim is for the smaller amount, and the Admiralty Court or the common law court cannot arrest a ship where the claim is for the larger amount; yet, although it is in one sense an inconsistency, in another sense it is not. It may be the view of the legislature that additional remedies are to be given in cases of claims for small amounts, or of a peculiar character relating to ships, which are not given in cases of larger amounts or of an ordinary character not relating to ships. The remedy to the seamen for their wages, for instance, is different from the remedy of domestic servants for their wages, and it does not at all follow that all that was not contemplated by the legislature, and I again am at a loss to see the great inconvenience.

Well, then, it was said that charterers and shipowners of smaller vessels would be at a disadvantage, because their ships would be liable to arrest. Of course, one answer would be, that if the amounts claimed were small the amount of bail would be small, and the inconvenience, therefore, as far as they are concerned, would not be the subject of very grave consideration.

I have gone through all these reasons, because it does not appear to me that the case is made out even as to great inconvenience, but I am also of opinion that even if it were made out

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it would not be sufficient to enable us to control the plain words of the Act of Parliament.

Now, in *Gunnestad* v. *Price* (1) Baron Cleasby does not really take any new ground which had not been already considered; but Baron Bramwell does, he says: "Shortly, the objections are, that on the construction contended for by the defendants the county court has Admiralty jurisdiction in cases in which the Admiralty Court has no original jurisdiction;" that I have dealt with—"that the High Court would have an appellate jurisdiction where it has not an original jurisdiction;" that I have dealt with; "that there could be transferred to it from the county court causes which it could not originally entertain, and so it could hear and decide cases not properly within its own jurisdiction or that of the county court." That, I have dealt with. "To these objections are to be added, not as aiding the construction of the statute, but helping to the probable intention of the legislature, the objections so forcibly stated in the judgment of the Common Pleas, to the Admiralty procedure being applied to such cases as those in question." Therefore, according to Baron Bramwell, those last objections are not sufficient—with which I cordially concur. We have only got the remaining three, therefore, and what does he say is the effect of the three. He says as to the limited construction, that is, confining it to Admiralty causes, "With great respect it seems to me a meaning may be given to the words without the admittedly preposterous consequences the defendants contend for;" and he says further, "This construction gives a meaning to the words without the absurd consequences which would follow on the defendants' construction." Consequently, he alone comes to the conclusion that those three consequences I have mentioned are so preposterous and so manifestly absurd that they could not have been in the intention of the legislature.

Now, with the greatest possible respect for Lord Justice Bramwell, and no one entertains a greater respect for him than I do, it shews how these different consequences strike different minds. Not only do they not appear to me to be either absurd or preposterous, but I cannot see any objection to them at all, I cannot see any objection on the ground that the Appeal Court has no original

(1) Law Rep. 10 Ex. 65, at p. 73.

jurisdiction over the same subject-matter. I cannot see any objection on the ground that the county court should have Admiralty jurisdiction where the Court of Admiralty has no jurisdiction, nor can I see any objection on the ground, which is the third and only one remaining, that the Court of Admiralty should transfer to itself especially difficult causes relating to maritime matters, though the Court itself had no original jurisdiction to deal with such a cause.

That being my opinion, it appears to me there is no absurdity and nothing preposterous in these consequences to induce us to overrule or control the plain meaning of the Act of Parliament. It does therefore lead me to the conclusion that the decision of the Privy Council is the correct decision, and consequently that we should allow this appeal.

JAMES, L.J. It appears to me that everything that could be said has been said in the judgments we have heard read with the addition made by the Master of the Rolls. All I can say is that having considered everything, I do most entirely adopt the language of the judgment of the Privy Council, as it seems to me disposing of almost the whole of the case.

The only thing that I shall say in addition to that is that it does appear to me that if you construe this last Act, which is the Act before us, irrespective of the 3rd section, merely considering it as a question of ordinary jurisdiction to be exercised by the county court, there could not have been, as it seems to me, the shadow of a doubt as to the meaning of the 1st and 2nd sections; that is to say, supposing there had not been the 3rd section giving the power of proceeding in rem, it would have been the merest matter of course to have held that the county court had the ordinary power of a county court to deal with the claims in question in its ordinary jurisdiction. Well, if that was so—if that was the meaning of the Act of Parliament irrespective of that 3rd section, is it inconsistent with the ordinary rules of construction of an Act of Parliament to say that a clause saying in so many words "In all the cases aforesaid the Court shall have jurisdiction in rem" is to be held to take away the jurisdiction in cases which it had in the plainest terms given it? Is it not, on the

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contrary, as if in order to remove all doubt the legislature had said, "Though you may think we could not have meant it we do in so many words say that in every one of these cases the county court shall have jurisdiction in rem." It is said that because they say in those cases the Court shall have jurisdiction in rem, that is to cut down the cases in which jurisdiction is given. If it had been intended to have said merely that the county court shall have the jurisdiction of the Court of Admiralty, in those particular cases it appears to me it would have said so in so many words; that is to say, the Act being an Act to amend a former Act and to give jurisdiction in certain maritime cases, the first section would have said that the Court should have such jurisdiction as the Court of Admiralty possesses in the following matters, and then the whole thing would have been made quite clear. It seems to me that the legislature intentionally did not do so, but gave jurisdiction in certain matters, and then went on to give the particular remedy of the Court of Admiralty in all the cases in which it had so given jurisdiction.

I only add these few words to what I have said before, namely, that I adopt as my judgment from the beginning to the end, the judgment of the Privy Council.

COTTON, L.J. If there had not been such a difference between the different judges and different Courts before whom this question has come, probably I should have contented myself by saying, that, in my opinion, the judgment of the Privy Council in the case referred to exhausts the matter, and is the correct decision, but I think it not right so to leave the case. What we have to consider in this case as the primary question, is, whether or no the 1st sub-section of the 2nd section of the Act of 1869, does or does not clearly include the action which has been commenced in the county court. The words seem simple enough, "that the county court shall have power and authority to try and determine the following causes: As to any claim arising out of any agreement made in relation to the use or hire of any ship." We must consider whether there is any ambiguity in those words, without reference to the question what will be the consequence of holding that they do or do not include a particular cause of action. It has

been said, that a charterparty is not a contract for the use or hire of a ship. In some cases the person who enters into the charterparty becomes, for the time being, the lessee of the ship. But it is quite sufficient to refer to the well recognized authority of "Abbott on Shipping," for the purpose of shewing that those words do aptly refer to and include a charterparty. Because what the learned author says is this (1): "A trading ship is employed by virtue of two distinct species of contract, first, the contract by which an entire ship, or at least the principal part thereof, is let for a determined voyage to one or more places. This is usually done by a written instrument called a charterparty." So that he does refer to it as a contract for the letting of a ship, and no one can for a moment say that when it applies to the whole of the ship it is not a contract for the use of a ship, or where it does not apply to the whole of the ship it is not a contract for the use of a part of a ship. That being so, here are words which, as regards the particular section with which we have to deal, have in themselves no ambiguity at all, and do aptly refer to an action arising in respect of a claim on a charterparty.

But then it is sought to restrict this by saying that it means any claim in which the Court of Admiralty has jurisdiction. I asked Mr. Herschell whether he could point out any claim arising on a charterparty in which the Court of Admiralty had jurisdiction? He said, No, except a matter which would come within the second part of this clause, "or an agreement in relation to the carriage of goods in any ship." So that practically, the argument comes to this, that we must disregard and give no effect whatever to the first words of this sub-section. In my opinion no sufficient reason has been given to justify us in disregarding these words or declining to give them their natural meaning. After what has been already said, I will refer to two only of the points pressed upon us. It has been said that this comes within an Act which transfers to the county courts Admiralty jurisdiction, and therefore we ought to restrict the power given by this section to powers which the Court of Admiralty has. We must consider here how and when this power was given. It was not given in the

(1) 11th ed. p. 100.

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original Act, and although this subsequent Act is an Act which is to be read as part of the first Act, yet it is in fact a subsequent Act giving additional power to the county courts. This gets rid of a great deal of the argument adduced by the respondents. Parliament had given by the first Act, some part of the Admiralty jurisdiction to the county court, and here it does not in terms say it gives such jurisdiction in this matter as the Court of Admiralty had, but having given to the county court certain Admiralty jurisdiction, with a power to transfer cases to the Court of Admiralty, and with power to appeal to the Court of Admiralty, it thinks fit to give the county court this additional power, not altering the power of appeal or the power of transfer. It only comes to this that parliament, having given certain Admiralty jurisdiction to the county court and giving it this additional power in matters or contracts relating to the use or hire of ships, still left a power of transfer to the Court of Admiralty and still left the appeal to the Court of Admiralty. Therefore assuming for the purpose of my judgment, that, as regards this particular cause of action there would be a power of transfer to the Admiralty Court, and that there is in cases like this, an appeal to the Admiralty Court—although it must not be considered that I express an opinion that it is so, that question not being now before us—but taking the argument as in favour of the prohibition most strongly, and assuming that there would be such a power of transfer and of appeal to the Court of Admiralty, the supposed difficulty, when the terms and circumstances under which the Act was passed are considered, does not in my opinion justify us in declining to give effect to the words of the later Act.

The only other point which I mention is this, that, according to our decision, there will be a lien practically on the ship in respect of a similar claim of a limited amount when there is no such right in respect of similar claims of a greater amount; but it only comes to this that parliament has thought fit to pass an Act which, according to its true construction, does give that right; and if that is so, is it the duty of this Court to cut down the enactment, because the Act has done something which may be thought inconsistent with the law not having being altered as regards claims of

a larger amount? In my opinion, no such considerations ought to induce us to say that effect is not to be given to the clear words of an Act of Parliament. 1880 THE ALINA. Cotton, L.J.

JAMES, L.J. It may not be inconvenient to add this with regard to one point. A great deal has been said about the power of transferring to the Court of Admiralty; but when the Court of Admiralty sits as an appeal Court its decision is final; but where the matter is transferred to it, it is transferred subject to an appeal to the High Court of Justice.

Appeal allowed.

Solicitors for plaintiffs: *Coote & Diver, Yarmouth.*
Solicitors for defendants: *T. Cooper & Co.*

WATNEY & CO., APPELLANTS; MUSGRAVE, RESPONDENT. *March* 11.

Revenue—Income Tax—Balance of Profits and Gains—Deduction for exhausted Capital—5 & 6 Vict. c. 35, s. 100, sch. D.—29 & 30 Vict. c. 36, s. 8.

The appellants, a firm of brewers, in order to increase the sale of their beer and so to increase their profits, purchased the leases of public-houses, which they let to tenants, who covenanted to buy of them all the beer to be sold in such houses. The appellants, besides covenanting to pay fixed rents for the terms of years reserved by the leases, were obliged, in some instances, to pay premiums for such leases. They claimed in arriving, for the purpose of the income tax, at the balance of profits and gains of their trade, to be entitled each year to an allowance in respect of a portion of the amount so paid by them as premiums, on the ground that such allowance represented a portion of their capital exhausted during the year in earning profits:—

Held, that the appellants were not entitled to any allowance in respect of the premiums.

CASE stated under the Customs and Inland Revenue Act, 1874 (37 & 38 Vict. c. 16), s. 9, as to income tax assessment under schedule D.

1. The appellants appealed against an assessment made on them under schedule D. of 16 & 17 Vict. c. 34, in respect of the profits of their trade.

2. At the hearing of the appeal, the commissioners made a considerable reduction in the assessment, but they refused to

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allow a further reduction of 4466*l.*, which was claimed by the appellants under the following circumstances.

3. The appellants made their profits in trade by brewing beer and selling it to persons who might think fit to buy it; but, in order to increase their trade, it has for years been their practice to buy the leases for various terms of licensed public-houses and beer-houses, and then to let such houses to tenants who covenant to buy of the appellants all the beer to be sold in such houses.

4. In order to obtain such leases the appellants are obliged, in many cases, to pay large premiums, and to covenant to pay a fixed rent for a term of years.

5. The profits made by the sale of beer to the tenants are included in the assessment, and the appellants claim that, for the purpose of arriving at the just balance of the profits and gains of their trade, it is necessary each year to make an allowance in respect of a portion of the amount which was paid by them to acquire the leaseholds, and without which they would not have been able to make any profits in respect of the same, and that such allowance represents only the portion of their capital exhausted during the year in earning the profits.

6. The following instance has been stated on the part of the appellants as an example.

7. The appellants recently bought the lease of a public-house for thirty years, for which they paid a premium of 1300*l.*, and covenanted to pay the landlord a rent of 105*l.* a year. Such lease contained the usual covenants for the lessees to repair, &c. The appellants let such public-house to a tenant who under his agreement is bound to buy of the appellants all beer to be sold in the house. (1) Assuming that their gross profit from such sale would amount to 60*l.*, which profit they could not have made unless they had expended the 1300*l.* in purchasing the lease, they claimed that the balance of profits and gains on which they were to be assessed should be less than that sum by 43*l.*, being the portion of the said sum of 1300*l.* which had been exhausted

(1) It was assumed for the purposes of the argument that the rent paid by the tenant was the same as that paid by the appellants, namely 105*l.* per annum.

during the year by reason of one year of the term having run out, namely, one-thirtieth of the said sum of 1300*l.* In the assessment to the income tax the 60*l.* profit from the sale of the beer was included.

8. The sum of 4466*l.* consisted of the aggregate of various sums relating to the leaseholds in which capital of the appellants was invested, as mentioned in paragraphs 4 and 5, and arrived at in the same manner as the sum of 43*l.* mentioned in the last paragraph.

9. But for the expenditure of the capital to pay the premiums, the leaseholds out of which profit is made, as mentioned above, could not have been acquired, nor such profit made, and each year a portion of the premium paid is exhausted.

10. The commissioners were of opinion that the claim to reduce the assessment by 4466*l.* ought not to be allowed.

The question for the opinion of the Court was whether the commissioners were right.

Grantham, Q.C. (*Poland*, with him), for the appellants, contended that as they must sink this sum in order to make the profit on which income tax was charged, they were entitled to make the deduction. He referred to *Knowles* v. *McAdam*. (1)

Sir J. Holker, A.G. (*Dicey*, with him), for the Crown, was not called on.

KELLY, C.B. I am clearly of opinion that the Crown is entitled to the judgment of the Court. In this case it is claimed to deduct, not the costs of production of the article, but expenses incurred and money disbursed to promote and increase the sale of the article after it has been produced. I am not aware of any authority to be found in the statutes or in any decision for deducting such expenses in ascertaining the amount of profit which is to be assessed under the Income Tax Acts. I am not aware that any exceptional qualification has ever been introduced by law or under authority which at all affects the mode in which the profits of the trade of a brewer shall be assessed and taxed. The deductions are confined entirely and exclusively to the costs and expenses

(1) 3 Ex. D. 23.

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incurred in the production of the article. (1) I do not pretend to enumerate what those costs and expenses are, but, amongst other things, one matter was referred to in the course of the argument, namely, the deduction of the rent or a part of the rent of the premises in which the beer is produced. Then there is also the cost of the raw material and the wages of the servants and labourers and other persons employed in the manufacture. Now, for the first time, as far as I am aware, it is sought to include in the sum to be deducted, so as to ascertain the balance which would constitute the net profits of the concern, sums of money expended, not in the manufacture, but after the production of the article in order to promote the sale or increase the quantities sold. Take by way of illustration the case I put in the course of the argument. Many houses, and amongst them no doubt brewers, engaged in manufacturing various articles of trade, after those articles have been prepared, or while they are preparing, with a view to increase the sale, spend large sums of money in advertisements. I am not, however, aware that any attempt has been made hitherto to claim to deduct the costs of advertisements, by means of which the quantity of beer sold in the course of the year may be considerably increased, but which has no reference to, and bears no part at all in, the production of the article. The present case is an instance, not of advertisements, but of expenses incurred to induce a publican or class of publicans to purchase quantities of beer. It may be necessary to take those expenses into consideration in ascertaining the net profits of a commercial firm during any given year

(1) 5 & 6 Vict. c. 35, s. 100, Schedule D, first case: "Duties to be charged in respect of any trade manufacture adventure or concern in the nature of trade not contained in any other schedule of this Act, rule 1. The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade manufacture adventure or concern upon a fair and just average of three years . . . . and shall be assessed charged and paid without any other deduction than is hereafter allowed." Rule 3 enumerates a number of things that may *not* be deducted, and by s. 101 deductions are allowed in the case of a person carrying on two trades, who may set loss in one against profit in the other, and a person renting a dwelling-house part of which is used by him for the purposes of any trade or concern or any profession may deduct a sum not exceeding two-thirds of the rent. Section 159 prohibits deductions other than such as are enumerated in the Act.

or time, but inasmuch as it has never been argued or even suggested that such expenses should be taken into consideration, in ascertaining the difference between the cost of production and the money realized during the course of the year by the sale of the beer, for the purposes of the income tax, I do not think we ought to deal with this in the way suggested. It only remains for me to observe that the case cited in the course of the argument was totally different from the present. That was a case of depreciation of the property which had been leased to the parties occurring in the course of the production and by reason of the production of the article itself. It appears to me that the expenses which are sought to be deducted here are of a character and description quite unconnected with the production of the article, and cannot consistently with the statute be deducted.

HAWKINS, J. I am also of opinion that the Crown is entitled to our judgment, as the argument has failed to convince me that there is any ground for allowing the deduction. The assessment is to be made on the profits of trade, and the Act of Parliament prescribes the mode in which the assessment is to be made. It sets forth in the schedules those matters which may or may not be claimed by way of deduction, and I cannot find, either in the Act itself or in the schedules, any ground whatever for saying that an allowance ought to be made in respect of the unremunerative premium paid for the lease of a public-house, which is bought by the brewer for the purpose of increasing his trade by insisting upon his tenant entering into a covenant to purchase all the beer he may require from his landlord's brewery. The house itself, it seems to me, is a matter totally apart from the trade. The trade of a brewer consists in manufacturing beer, and selling it to customers, and when it has got into the customers' hands at a fixed price, the price that is paid for the beer, minus all those charges which are strictly incidental to the production of it, which are clearly matters to be deducted, constitutes the profit which is liable to be assessed. As at present advised, I am far from saying that the cost of conveying the beer to the consumer ought not to be allowed to be deducted as a legitimate trade expense. If the cost of conveying the beer to the customer were not incurred, he

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would be obliged to go to the brewery and fetch his own beer; and it stands to reason that the price paid at the brewery by the customer who at his own expense carried it away, and delivered it at his own house, would be less than the price realized where the brewer himself conveys and delivers it to his customer. In this case I do not find that the house has anything to do either with the manufacture of the beer, the conveyance of it from the brewery, or the price paid by the public for it. The house, it is true, is or may be a valuable adjunct to the brewery, by increasing the number of consumers; but the house, whether it yield a profit or loss to the brewer, is not in the least connected with the trade profit of the brewery. The rent of the house is not taken into consideration by the brewer in considering what are the incomings of the trade, neither are the outgoings of the house to be taken into consideration when we come to consider the outgoings of the trade.

I cannot myself, I confess, see the difference between this case and the illustration I put in the course of the argument. If a man has a piece of ground upon which he is minded to speculate, and build for himself a brewery, and carry on in that the business of a brewer; and if in order to bring custom to his brewery he builds on that ground a couple of hundred houses, imposing upon each tenant the obligation of buying beer from him, and by the sale of the beer he makes a profit, but the tenants do not pay their rents, I cannot see upon what ground the rents in arrear should be charged against the profits of the trade as being expenses incurred in the trade. So here there are two distinct things, the trade of brewer and the public-house, and the expense incurred in respect of the latter cannot be deducted from the profit of the former.

Judgment for the Crown.

Solicitors for appellants: *Pownall, Son, Cross, & Knott.*
Solicitor for respondent: *Solicitor of Inland Revenue.*

THE ATTORNEY GENERAL *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

1880
March 9.

Revenue—Railway Passenger Duty—5 & 6 Vict. c. 79, s. 2—Sum charged as Fare —Sum charged to cover the Government Duty, or for extra Accommodation.

By 5 & 6 Vict. c. 79, a duty at the rate of 5*l.* per cent. is payable upon all sums received or charged for the hire, fare, or conveyance of passengers upon any railway. A local Act fixed the maximum rates to be charged by the defendants "for the conveyance of passengers along the said railway, including the tolls for the use of the railway, and of carriages, and for locomotive power, and every other expense incidental to such conveyance as aforesaid, except government duty." In order to cover the duty of 5*l.* per cent., the defendants required passengers to pay in addition to the sum, whether maximum or otherwise, nominally charged for fare a further sum of five per cent.:—

Held, that the duty was payable on the entire amount received by the defendants, and not merely on the amount nominally charged for fare.

Semble, that the duty would be so payable, although the amount received exceeded that which the defendants were lawfully entitled to charge.

Quære, whether the company were entitled to add the five per cent. to their fares to cover the government duty.

The defendants provided sleeping saloon carriages available for first-class passengers on payment of a special charge in addition to the ordinary fare, and provided with sleeping accommodation, a lavatory, and other conveniences. When the carriages arrived at their destination they were put into a siding where the passengers could remain until the morning, and a special servant was employed to wait upon them, to call them when they wished, and to bring them hot water when they were called:—

Held, that the accommodation so provided was incidental to the conveyance of passengers, and therefore the extra charge was a fare, on which duty was payable, within the meaning of 5 & 6 Vict. c. 79.

INFORMATION under 5 & 6 Vict. c. 79, s. 4, against the defendants from which and from the answer the following facts appeared:—

By 5 & 6 Vict. c. 79 (the Railway Passengers Duty Act) s. 2, and the schedule to that Act, certain duties are made payable, and among others "for and in respect of all passengers conveyed for hire upon or along any railway, a duty at and after the rate of 5*l.* for 100*l.* upon all sums received or charged for the hire, fare, or conveyance of all such passengers."

The defendants are a railway company incorporated by Act of Parliament, and convey passengers for hire from London to divers parts of Great Britain.

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By s. 63 of a local and personal Act of the defendants (9 & 10 Vict. c. cciv.), it is enacted (inter alia) as follows:—

"That the maximum rate of charge to be made by the company for the conveyance of passengers along the said railway, including the tolls for the use of the railway, and of carriages, and for locomotive power and every other expense incidental to such conveyance as aforesaid, except government duty, shall not exceed the following sums; that is to say,

"For every passenger conveyed in or by express train the sum of $2\frac{1}{2}d.$ per mile.

"For every passenger conveyed in a first-class carriage the sum of $2d.$ per mile.

"For every passenger conveyed in a second-class carriage the sum of $1\frac{1}{2}d.$ per mile.

"For every passenger conveyed in a third-class carriage by any such other train the sum of $1d.$ per mile."

The maximum rate of fare permitted to be charged by the last-mentioned Act has not in all cases been charged by the defendants in the case of passengers conveyed by first or second-class carriages, but has been charged in nearly every instance in the case of passengers conveyed by third-class carriages.

The defendants require the passengers conveyed by them to pay in addition to the rate of fare, whether maximum or otherwise, a sum of five per cent. thereon to cover the duty of $5l.$ per cent. imposed by the Passengers Duty Act, and they contend that they are not liable to pay duty on the entire amount charged by them to and received from their passengers, but only on the amount charged for fare. The defendants keep an account of the sums so received by them separate from the account of sums charged for the hire, fare, and conveyance of passengers.

The defendants further dispute their liability to pay the duty on certain fares charged by them for the conveyance of certain first-class passengers under the following circumstances.

The defendants run by certain of their night trains special carriages called "sleeping carriages." The defendants provide for each person using such sleeping carriages a couch six and a half to seven feet long, a clean sheet, a rug or blanket, and

a clean pillow case, a lavatory, with water laid on, and soap and towels, a water bottle and glass, and a looking glass, and also a water-closet, &c. When the persons using the sleeping carriages desire to enter them to retire to rest they are not again disturbed during the night. When the sleeping carriage has arrived at its destination it is put into a siding specially reserved for it, where the persons using it can remain until the morning, and a special servant is employed to wait upon them there, to call them when they wish, and to bring them hot water when they are called.

A special independent charge is made by the defendants for providing the aforesaid accommodation, and a special ticket is issued entitling the holder to a berth in the sleeping carriage (if there be room) on production of a first-class railway ticket, covering the journey for which the sleeping carriage is used. No one who has not already paid the first-class fare for his conveyance upon or along the railway for the journey is permitted to use the sleeping carriages.

The defendants contended that the charges made by them for providing the aforesaid accommodation were not sums received or charged for the hire, fare, or conveyance of passengers, but independent charges for what practically amounts to hotel accommodation, and were not liable to the duty imposed by the Railway Passengers Duty Act.

The information claimed a declaration that the defendants were liable to pay duty at the rate of 5*l.* for every 100*l.* for and in respect of all sums received or charged for the hire, fare or conveyance of passengers conveyed for hire by them, and that they were not exempt from duty in respect of the five per cent. received by them from their passengers as aforesaid, nor in respect of the fares charged for the conveyance of passengers in sleeping saloon carriages.

Sir H. Giffard, S.G., and *W. W. Karslake*, for the Crown.
Dugdale (*Darling*, with him), for the defendants.

KELLY, C.B. Every argument applicable to such a case as this has been presented to us, but I have not the slightest doubt

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that upon the true construction of this Act of Parliament the Crown is entitled to the judgment of the Court upon both the points raised.

The first question is, whether the Crown is entitled to charge the duty on the entire sum charged to the passenger, including five per cent. above the charge which he would have to pay, which is added to cover the duty. I am of opinion, without entering into the question whether it is lawful as between the company and the passenger to charge this five per cent., that if the company think fit to add to the amount, suppose it is twopence per mile, which they are entitled to charge, a further amount of five per cent. on the sum, whatever it may amount to over and above the twopence per mile, the Crown is entitled to duty on the entire sum. The provision of the Act of Parliament is that the Crown shall be entitled "for and in respect of all passengers conveyed for hire upon or along any railway a duty at and after the rate of 5*l.* for 100*l.* upon all sums received or charged for the hire, fare, or conveyance of all such passengers." If a passenger, before he is permitted to travel from one place to another, has to pay a sum of money for his transit, it is on tha that the duty of five per cent. is payable. If, therefore, that sum which the passenger has to pay includes five per cent. in addition to what would have been the charge but for this duty being payable, still that sum is paid by the passenger, it is received by the railway company, and all that the traveller gets for it is the passage from one place to another, so that it comes within the express terms of the Act of Parliament, and the Crown is entitled to the duty on it. If we were called upon to decide whether the railway company can properly charge to the passenger this five per cent. that they have to pay as duty, my present impression is, though I do not mean to express it judicially, that looking at the language of the statute, the company have no right to make the charge. The words are, "the maximum rate of charge to be made by the company for the conveyance of passengers along the said railway, including the tolls for the use of the railway and of carriages and for locomotive power and every other expense incidental to such conveyance as aforesaid, except the government duty, shall not exceed the following sums." I think that means

that they have a right to make a maximum charge to include every expense except the government duty, which they have no right to charge at all. Whether that be so or not, I think the company are liable to duty upon the aggregate sum which they demand and receive from a passenger.

With regard to the second question, there might be a matter of some nicety if what is supplied were something clearly apart and different from the usual accommodation of a railway company, such, for instance, as providing a dinner or something else which really was not in any sense necessary to or connected with the passage. Looking, however, in the present case, to the description of that which the defendants provide, it seems to me that the additional accommodation only has the effect of making the railway carriage more convenient than usual, but it remains, after all, only a railway carriage better fitted up than some others.

Under these circumstances, I really do not think that any reasonable doubt can be entertained on the subject, but that the Crown is entitled to the duty of 5*l.* per cent. upon what the passenger pays, whether he pay upon one ticket or two, and whether for a carriage of an ordinary description or one of a superior description, with an amount of accommodation not to be found in an ordinary carriage. In either case it is what the passenger pays for his conveyance from one place to another, upon which duty must be paid. I think, therefore, the Crown is entitled to the judgment of the Court.

HAWKINS, J. I am of the same opinion. The Crown is entitled to a duty at the rate of 5*l.* in every hundred for the hire, fare, or conveyance of passengers. On the first question which is raised, it appears that the company being bound to pay a passenger duty of 5*l.* per cent. have added five per cent. to the ordinary fares which they would otherwise have charged. They then say tha the Crown is only entitled to a duty of 5*l.* per cent. upon that sum of money which would represent the fair sum for the conveyance of the passenger, and not upon the sum which has been added in order to cover the duty. I do not think that that is a right way to look at the matter. I think that however the sum actually

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charged the passenger for his conveyance is made up, in fact whatever may be passing in the minds of those who settle the rates and fares, the whole sum they receive from a passenger in respect of his carriage from one place to another is, properly and strictly speaking, "a sum received or charged for the hire, fare, or conveyance of such passenger."

Upon one point that was raised, though I do not think it necessary to decide it, I cannot help expressing an opinion. I think it is immaterial whether the company are strictly entitled to charge the particular sum which they do, for I am of opinion that if a railway company charges fares in excess of those sanctioned by Act of Parliament, the duty would be chargeable upon the sums which they have actually charged and received. The legislature does not say that they shall be liable to the duty in respect of all sums which they are entitled to charge and which they do charge, but the duty is imposed upon "all sums received or charged for the hire, fare, or conveyance of passengers." It is no answer, therefore, to say that the charge is in excess of that which the company are entitled to make, and might be resisted by the passenger, for the passenger has not resisted but has paid, and the company have received the money.

As regards the second point I confess that at first it seemed to me there was reason in the defendants' contention. I quite concede that a case might happen where the sort of accommodation provided would be by no means incidental to the mere transit of passengers. Suppose, for instance, an ordinary drawing-room saloon, as it is called, and a library were fitted up, and newspapers provided and coffee served to all persons on the journey, it would be absurd to say that those were things incidentally connected with the carriage so as to make a charge for that a charge for the conveyance. But that, looking to the statement of the accommodation afforded, is not the case here; and moreover, even if the company were entitled to make these separate charges for matters not incidental to the conveyance, they have not in point of fact done so. What they have done is to charge one lump sum as for the ordinary first-class fare, and secondly, an additional sum for the right conferred on the passenger to travel in a more luxurious carriage. A luxurious sleeping-apartment is as much incidental,

as it strikes me, to the conveyance as is "first-class" itself. The mere conveyance may be by the bare boards afforded by a truck, more luxurious accommodation is afforded by a third-class carriage, still more by the second, and so on up to the best in the way of sleeping accommodation. I confess I see no reason to distinguish this and to say that it is not incidental to the travelling, any more than I should think of saying that the extra accommodation of a first-class carriage with cushions and curtains is not essential to the conveyance, because some persons travel second and some third-class. If there really is an extra expense entailed upon the defendants in providing that sort of accommodation which does not belong and is not incidental to the actual conveyance of a passenger, as, for instance, shunting the carriage for him after he arrives at the end of his journey, and calling him, and providing him with hot water as if he were in an hotel, I should be far from saying that a separate charge might not be made for that, but it seems to me that the company have not provided and made a charge for hotel accommodation. They have charged for the conveyance at an increased rate, for which they have provided conveniences which they were not bound to provide. This is just what they do in an ordinary way where a passenger has the convenience of a waiting-room and refreshment-room. It would be idle to contend that these things could be separated from the conveyance so as to exempt some portion of the ordinary fare from duty, because it might be said to represent the value of this accommodation. I think that the company are liable to pay five per cent. in respect of the extra charge for this sleeping accommodation, upon the simple ground that the charge so made is charged for and is incidental to the conveyance of the passenger.

Judgment for the Crown.

Solicitor for the Crown: *Solicitor of Inland Revenue.*
Solicitor for defendants: *R. F. Roberts.*

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Dec. 10.

FINCH AND ANOTHER *v.* THE GREAT WESTERN RAILWAY COMPANY.

Right of Way—Award under Inclosure Act—Enlargement of User of Way.

Where there is an express grant of a private right of way to a particular place to the unrestricted use of which the grantee of the right of way is entitled, the grant is not to be restricted to access to the land for purposes for which access would be required at the time of the grant.

By an inclosure award a road was set out as a carriage road and drift way from a highway to certain of the inclosed lands. The defendants, a railway company, acquired some of these lands, and built a cattle pen thereon adjoining their railway, and used the road for the passage to and from the highway of cattle that were to be or had been conveyed on their railway, such user being much greater than the user at the time of the grant, which was exclusively for agricultural purposes:—

Held, that this was a lawful user on their part, and that they were not restricted to the user which existed at the time of the grant.

SPECIAL CASE, from which the following facts appeared.

The claim in the action was for damages for trespasses alleged to have been committed by the defendants on certain lands of the plaintiffs, known as Broadmead Drove or Fisherton Drove, in the parish of Fisherton-Anger, in the county of Wilts, and for an injunction to restrain the defendants from committing further trespasses of a like nature.

In the year 1790 certain open and common lands in the parishes of Berwick St. James, and Fisherton-Anger, in the county of Wilts, were inclosed under an Act 29 Geo. 3, c. xlii. The commissioners allotted certain roads, and among others the following:—"One other private carriage road and driftway of the breadth of twenty feet, called Broadmead Drove, branching out of the turnpike road leading from Salisbury towards Wilton, at or near the north-west corner of Churchfield, and extending from thence in a southward direction by the west side of Churchfield over an allotment hereinafter described, and awarded to the said James Lord Malmesbury, to a small old inclosed meadow belonging to the said James Lord Malmesbury, called Spring Ditch Close, and then turning westwards and continuing over the same allotment to the said James Lord Malmesbury, to the east corner of an old inclosed meadow belonging to James Feltham, which

said road or way we the said commissioners do hereby award, order, and appoint, shall for ever hereafter remain a private carriage road and driftway for the use of the respective owners and occupiers for the time being of the allotment over which the same passes, and of several old inclosed meadows and woodlands belonging to the said James Lord Malmesbury, a meadow called Broadmead belonging to William Hayter, Esquire, and the said inclosed meadow belonging to James Feltham to which the same road leads."

The freehold of the land over which the last-mentioned private carriage road and driftway passed became vested in the plaintiffs.

An allotment on the east side of Broadmead Drove containing 4*a.* 1*r.* 11*p.* was, inter alia, allotted to James Lord Malmesbury. The defendants became possessed in fee simple under their statutory powers for the purposes of their undertaking of a small portion of the above-mentioned allotment of 4*a.* 1*r.* 11*p.* from the successors in title of William Hayter, who had obtained the same by exchange with Lord Malmesbury, and on it they erected a cattle-pen.

The cattle-pen had been used by the defendants for some time past for the purpose of collecting cattle conveyed to that spot by them as carriers on their railway, or else to be conveyed thence by them in a similar manner. For this purpose cattle were driven from the cattle-pen along the Drove to the highway, and also from the highway along the Drove to the cattle-pen.

No public road exists from the cattle-pen to the highway; but before any land was acquired by the defendants it had been the undisputed practice for many years for owners and occupiers of the lands lying on either side of the Drove (including the lands now belonging to the defendants) to drive as of right along the Drove cattle to be pastured upon, or that had been pastured upon such lands, and carts loaded with agricultural produce, fodder, and manure, that had been produced upon or were required for use upon such lands to and from the turnpike road. All rights of the former owners and occupiers of the lands of the defendants arising out of such ownership and occupation became vested in the defendants.

The plaintiffs were owners of a large lunatic asylum close to

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the Drove, and the traffic occasioned by the defendants so driving cattle on the Drove was accompanied by much noise, which was heard in the asylum.

The plaintiffs and their predecessors in title always repaired the Drove at their own expense, and were put to expense in keeping it in repair, on account of the use made of it by the defendants as above-mentioned.

The plaintiffs contended that by the terms of the award the Drove could not be lawfully used except as a private carriage road and driftway by the owners and occupiers of the lands therein described as the allotment over which the road passes, the several old inclosed meadows and woodlands belonging to James Lord Malmesbury, the meadow called Broadmead, at the date of the award, and the inclosed meadow at that time belonging to James Feltham.

The question for the opinion of the Court was: Whether the defendants were entitled under the award or otherwise to use the Drove for the purpose of driving cattle thereon, between the cattle-pen and the highway, which cattle they had conveyed or were about to convey on their railway.

1879. Dec. 1. *A. Charles, Q.C.* (*Bromley*, with him), argued for the plaintiffs, and

Herschell, Q.C. (*Medd*, with him), for the defendants:—The arguments and cases cited appear in the considered judgment of the Court.

Cur. adv. vult.

Dec. 10. The judgment of the Court (Kelly, C.B., and Stephen, J.) was delivered by

STEPHEN, J. This was a special case argued before us on the 1st instant. The material facts were as follows:—A highway runs from Salisbury to Wilton. The plaintiffs are the owners of certain closes on the south of this highway, and also of the soil of a drove called Broadmead Drove, which separates two of those closes.

The Great Western Railway runs parallel to the high road and to the south of the closes above-mentioned. Broadmead Drove runs to and across the railway, and thence continues its course in

a westerly direction to other closes which need not be mentioned. At the point of junction between the Broadmead Drove and the railway, the company have constructed a cattle-pen on land taken by them under their parliamentary powers, which land was formerly part of a meadow containing rather more than four acres belonging to Mr. William Hayter. The company are in the habit of driving cattle from all parts of the neighbourhood to this pen, and of collecting cattle brought by the railway from all parts of their system, and driving such cattle along Broadmead Drove to the high road and thence to other places in the neighbourhood. The question is, whether they are entitled to use the Drove in this manner, under the following circumstances:—

Before 1790 all the land in question was common field. In 1790 an inclosure award was made whereby, after recitals as to their authority and proceedings, the commissioners set out certain roads in the following words: "We have set out and appointed, and by this our award do set out and appoint, the several roads and ways in, through, and over, or by the sides of, the new inclosures or allotments to be made by virtue of the said Act, in such directions and of such breadths as are hereinafter mentioned and particularly described (that is to say), (6.) One other private carriage road and drift-way of the breadth of twenty feet called Broadmead Drove" (then follow the abuttals), "which said road or way we, the said commissioners, do hereby award, order, and appoint shall for ever hereafter remain a private carriage road and driftway for the use of the respective owners and occupiers for the time being of the allotment over which the same passes and several old inclosed meadows and woodlands," one of which was the field of about four acres in extent already referred to.

There seems to be no doubt that at the time of the award the driftway in question served merely as a mode of access to a few meadows used exclusively for agricultural purposes. The Great Western Railway now passes through some of these meadows, and the cattle-pen already mentioned is in one of them. The result, of course, is that probably thousands of cattle pass along the driftway for every one that passed when the award was made, and the question is whether such a user of the way allotted by the award can be justified.

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Upon the whole we are of opinion that it can be justified, that the right of way is general in its terms, and that though the altered circumstances of the land have greatly increased the traffic on the road, that circumstance does not affect the right of the Great Western Railway as owners and occupiers for the time being to make use of it in the manner above described.

We have not arrived at this conclusion without some difficulty, as the authorities which bear upon it are many, and some of them may not be altogether consistent.

The view presented to us on behalf of the plaintiffs was that the provisions in the award gave the owners and occupiers for the time being a right to use the private way as a driftway for bringing cattle to and from the different closes which it traverses, and for no other purpose. That is to say, the defendants' land having been agricultural land at the time when the Act passed, the road to it can still be used only to the extent to which, and in the same manner as it was used while the land was agricultural land, although the land was awarded to the predecessors of the company without any particular description, or limitation, or qualification. In support of this view reference was made to the following authorities: 1 Rolle's Abridgment, fol. 391, pl. 3; *Howell* v. *King* (1), *Lawton* v. *Ward* (2), *Allan* v. *Gomme* (3), *Skull* v. *Glenister* (4), and *Williams* v. *James.* (5) All these authorities, except *Allan* v. *Gomme* and *Skull* v. *Glenister*, refer to cases of prescription, and may be said to establish the proposition that where there is a right of way proved by user, the extent of the right must be measured by the extent of the user. The strongest and the most recent case of this kind is *Wimbledon and Putney Commons Conservators* v. *Dixon* (6), in which it was held that immemorial user of a way over Wimbledon Common for agricultural purposes did not authorize its use for the purpose of carting building materials to a place on which houses were to be erected.

Of the cases which were mentioned, two were cases of express grants, namely, *Allan* v. *Gomme* (3) and *Skull* v. *Glenister.* (4)

(1) 1 Mod. 190.
(2) 1 Ld. Raym. 75.
(3) 11 Ad. & E. 759.
(4) 16 C. B. (N.S.) 81.
(5) Law Rep. 2 C. P. 577.
(6) 1 Ch. D. 362.

These require examination, as their consistency with authorities referred to on the other side is not immediately apparent, though we do not say that they are really inconsistent. In *Allan* v. *Gomme* (1) there was reserved to the occupiers of a certain tenement "a right of way and passage over the said close to the stable and loft over the same, and the space and opening under the said loft, and then used as a woodhouse." The Court held that the meaning of this reservation was, that the defendant should be "confined to the use of the way to a place which should be in the same predicament as it was at the time of making the deed." They did not, indeed, consider that the right of way depended on the space being used as a woodhouse, but they thought it must be used "for purposes which were compatible with the ground being open, and that if any buildings were erected upon it" (which happened), "it was no longer to be considered as open for the purpose of this deed."

In *Henning* v. *Burnet* (2), Parke, B., said: "In *Allan* v. *Gomme* (1) "a more strict rule was laid down than I should have been disposed to adopt; for it was said that the defendant was confined to the use of the way to a place which should be in the same predicament as it was at the time of making the deed. No doubt if a right of way be granted for the purpose of being used as a way to a cottage, and the cottage is changed into a tanyard the right of way ceases; but if there is a general grant of all ways to a cottage, the right is not lost by reason of the cottage being altered." This is quoted with approval by Malins, V.C., in *United Land Co.* v. *Great Eastern Ry. Co.* (3)

It seems to us upon the whole that the proper view to take of *Allan* v. *Gomme* (1) is that it establishes no general principle, but turns on the construction of the particular deed referred to—a deed bearing no resemblance to the grant in the present case.

In the case of *Skull* v. *Glenister* (4), a plot of land was granted to Wheeler, "together with a right of way and passage" over a certain new road to certain other roads. Glenister bought land adjoining Wheeler's close, but having no communication with the new road. He afterwards became the tenant of Wheeler's close,

(1) 11 Ad. & E. 759.
(2) 8 Ex. 187, at p. 192.
(3) Law Rep. 17 Eq. 158.
(4) 16 C. B. (N.S.) 81.

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and, wishing to build on his own close, stacked building materials on Wheeler's close, using the new road in order to bring them there. The materials were afterwards conveyed from Wheeler's close to Glenister's close. The case decides that, under these circumstances, the learned judge who tried the case was right in leaving to the jury the question "whether the defendants used the way as a way to Wheeler's land, or was it a mere colourable use of it for the purpose of getting at their own land? Did the defendants use the way merely for the purpose of carrying the building materials through Wheeler's close to their own land?" Williams, J., based his judgment on a passage in Gale on Easements, which quotes at length a passage from Rolle's Abridgment and the case of *Lawton* v. *Ward* (1), and concluded by saying, "these authorities appear to establish the principle that if the defendants here had directly used the road in question as a way over the grantor's land through Wheeler's close to Glenister's, that would have been an excess of the right. The question was whether they had not substantially done so."

On the authority of these cases, particularly on that of *Skull* v. *Glenister* (2), we were pressed to say that to use Broadmead Drove as a way on to Hayter's meadow merely in order to pass out of Hayter's meadow by the railway which, subsequently to the award, had been made through it, was an excess of the right conferred by the award. It must be admitted that there is a considerable resemblance between the cases, though they are not absolutely identical. To use a private road into one close merely in order to pass over it into an adjacent close is not quite the same thing as to use a private road into a close in order there to make use of a public highway carried through the close subsequently to the grant. We must also observe, upon the judgment of Williams, J., that all the authorities quoted in the passage from Gale on Easements are cases in which the right was prescriptive, and the question to be solved was the extent of the grant to be inferred from user. Moreover, one of the two passages quoted from Rolle (3) seems inconsistent with the inference deduced from the authorities. "In trespass for breaking his

(1) 1 Ld. Raym. 75.

(2) 16 C. B. (N.S.) 81.

(3) Fo. 391, pl. 2.

close, if the defendant justifies going over this close because he hath used time out of mind to have a way over it from D. to Blackacre, and the plaintiff replies that at the time of the trespass the defendant went with his carriages from D. to Blackacre, and thence to a mill, this will not maintain his action, for when the defendant was at Blackacre he might go whither he would." These considerations are not without their weight, though probably, if they stood alone, we should not regard them as warranting us in differing from *Skull* v. *Glenister*. (1) There are, however, several later decisions on cases closely analogous to the one before us which must now be considered. Before examining them we may remark that one distinction between the cases cited on behalf of the plaintiff and the case before the Court is, that the former are cases of a grant of a way, or of prescription, which implies a grant. The latter is one in which the way is granted under an award made under an Inclosure Act, which grants to the predecessors in title of the defendants a piece of land, which they are entitled to enjoy without restriction or limitation. In this the case before the Court resembles the cases which we now proceed to consider. They seem to us to establish the principle that where there is an express grant of a private right of way to a particular place, to the unrestricted use of which the grantee of the right of way is entitled, the grant is not to be restricted to access to the land for the purposes for which access would be required at the time of the grant. The first of these cases is the *United Land Company* v. *Great Eastern Ry. Co.* (2) In this case the Great Eastern Railway purchased from the Crown land for the purpose of their line, intersecting land acquired by the Crown under an Act of Parliament which prohibited building upon it, as it was within the range of the guns of a fort. At the time of the purchase the land was used only for pasture. The Great Eastern Railway agreed to make four level crossings over their line, by which access could be had from one part of the severed land to the other. Some years after the agreement the part of the land beyond the crossings was sold to the United Land Company, and the statutory prohibition against building being removed, the land was laid out in lots for building purposes. The railway company

(1) 16 C. B. (N.S.) 81. (2) Law Rep. 17 Eq. 158; Ibid. 10 Ch. 586.

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considered that the level crossings ought not to be used for purposes of access to the houses so built. It was, however, held both by Malins, V.C. (1), and afterwards by the Court of Appeal in Chancery (2), that they were so entitled on the ground that "the crossings were to be communications for every purpose for which at the time or at any future time the owner should think fit to appropriate his land." This comes very near to the case before us, though no doubt there were several circumstances in the grant which threw more light on the actual intention of the parties than is to be had in the case before us.

Newcomen v. *Coulson* (3) more closely resembles the present case. An inclosure award made in 1760 set out certain roads for the owners for the time being of certain allotments and their tenants and farmers to and from certain allotments. It was provided that one of the roads should be thirty feet wide, and that if any owner of an allotment should "street out" the way it should always remain eleven yards wide between the quick-sets. More than a century after the award was made one of the allotments was used as building land, and the owner began to convert the cart road into a metalled road. The plaintiffs sued to restrain him from doing so and from using the right of way for other than agricultural purposes, but the application was refused by Malins, V.C., and his decision was upheld by the Court of Appeal. In delivering his judgment, the Vice-Chancellor said, "I am at a loss to see any principle on which a person who takes land under an inclosure is bound for all time to use that land for the purpose for which it was used when the inclosure was made. If that is the case here it is the case all over the country, and I suppose hundreds of thousands, if not millions, of acres of land would have this principle applied to them, that the owner of the land under the inclosure could only use the land for the purpose for which it was used when the inclosure was made, that is for agricultural purposes, because, although they might use the land for other purposes, they could not use the roads for other purposes." The Vice-Chancellor also laid stress on the case of *Dand* v. *Kingscote*. (4) The pleadings in this case are exceedingly complicated, but the

(1) Law Rep. 17 Eq. 158.
(2) Law Rep. 10 Ch. 586.
(3) 5 Ch. D. 133.
(4) 6 M. & W. 174.

effect of the decision is shortly stated thus by Malins, V.C.: "The decision in *Dand* v. *Kingscote* (1) was that a reservation of a right of way from and to the colliery entitled the man who had the right" (upwards of 200 years after it was reserved) "to adapt it to the improvements of the age, and the improvements of the age required that he should have a right to use a locomotive over the land." A right of way which was granted to give access to pastures may lawfully be used for access to a town subsequently built on them; and if a way-leave reserved for working a colliery by horse power may lawfully be worked by steam power, it seems difficult to resist the inference that a driftway which when granted gave access to pastures may be used for the purpose of access to a railway station afterwards built upon it.

Mr. Charles attempted to distinguish *Newcomen* v. *Coulson* (2) from the case before us on a variety of grounds. He said that in *Newcomen* v. *Coulson* (2) the road was thirty feet wide, which the Vice-Chancellor regarded as clear proof that it was never intended to be confined to agricultural purposes only. He also pointed out that the owner of the allotment had power expressly reserved to "street out" the road, and he observed lastly that the object in that case undoubtedly was to get access to the allotment and not to go beyond it. None of these distinctions appear to us to be substantial. As to those which turn upon the character of the road, it must be observed that in the present case no question as to the character of the road arises. It retains the width and character specified in the award. It is, as it always was, a driftway twenty feet wide. The only difference in its user is that more cattle now pass along it than was formerly the case. As to the point that in *Newcomen* v. *Coulson* (2) the road led to the allotment in its new condition, whereas in this case the cattle pass away from it by the railway, it appears to us that it would be impossible to maintain that, if people were to have free access by a private way to new houses built on an allotment, they should be bound as often as they used that way to return by it, instead of using any other road which might happen to be open to them.

It is remarkable that *Skull* v. *Glenister* (3) was not cited in the

(1) 6 M. & W. 174. (2) 5 Ch. D. 133.
(3) 16 C. B. (N.S.) 81.

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argument on *Newcomen* v. *Coulson*. (1) It appears to us that if the two are inconsistent, we must follow *Newcomen* v. *Coulson* (1), but the cases may be reconciled (though the reasoning in the judgment of Williams, J., seems scarcely consistent with the latter case) by treating *Skull* v. *Glenister* (2) as deciding only that if there is a private right of way to one close, it must not be used colourably with the real intention of going to a different though adjoining close. Upon the whole, therefore, there will be judgment for the defendants with costs of the action and special case.

Judgment for the defendants.

Solicitors for plaintiffs: *Gregory, Rowcliffes, & Co., for C. M. C. Whatman, Salisbury.*

Solicitor for defendants: *R. R. Nelson.*

Dec. 11.

[IN THE COURT OF APPEAL.]

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Vendor and Purchaser—Conveyance of Land adjoining intended Highway—Presumption as to Ownership of Soil of intended Highway—Statute of Limitations (3 & 4 *Wm.* 4, *c.* 27), *ss.* 2, 3—*Dispossession of Owner of Land—Discontinuance of Possession—User of Land.*

The presumption that the soil of a highway belongs to the owner of the adjoining land, usque ad medium filum viæ, does not apply to ground, which was intended to be used as a highway, but has never been dedicated to the public; and if the owner of the soil of the intended highway disposes of the adjoining land by conveyances in which it is described as bounded by the intended highway, the grantees do not acquire by presumption of law the ownership of the soil of the intended highway.

Acts of user committed upon land, which do not interfere and are consistent with the purpose to which the owner intends to devote it, do not amount to a "dispossession" of him, and are not evidence of "discontinuance of possession" by him within the meaning of 3 & 4 Wm. 4, c. 27, s. 3.

In 1854 L. conveyed to the defendant a plot of land upon the south side of an intended street, upon which the defendant built a factory. In 1857 L. conveyed to certain trustees the plot of land upon the north side of the intended street, which in 1872 vested in the defendant. Neither of the conveyances granted in express terms the soil of the intended street, but they described the plots of land as bounded by it. It was never dedicated to the public as a highway. From

(1) 5 Ch. D. 133. (2) 16 C. B. (N.S.) 81.

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1854 the defendant had placed upon the intended street materials used at his factory, so as to block it up except as against foot passengers, and in 1865 he enclosed an oblong portion of it. In 1872 he fenced in the ends of the intended street. The plaintiff was tenant for life of all the land of which L. had died seised, and in 1876 commenced an action to recover the site of the intended street. Within twenty years before action L. had repaired a gate at one end of the intended street:—

Held, first, that the conveyances executed by L. in 1854 and 1857 did not by presumption of law grant the soil of the intended street; secondly, that the title of the plaintiff was not defeated by the Statute of Limitations (3 & 4 Wm. 4, c. 27), ss. 2, 3.

SPECIAL CASE stated by an arbitrator in an action of ejectment pursuant to a judge's order.

The land sought to be recovered was situate in the township of Kirkdale, and within the borough of Liverpool. One part of it was the soil of an intended street, called Grundy Street, running from east to west, and leading on the east into Victoria Road, and on the west into Regent Road. It was bounded upon the north by land conveyed to the Mersey Dock Trustees in 1857, as hereinafter mentioned: it was bounded upon the south at the eastern end by Napier Place, and along the rest of the line of the street by land conveyed to the defendant in 1854, as hereinafter mentioned. The other part was Napier Place, a triangular piece of land having its apex towards the south, and at its base immediately adjoining the east end of the south side of Grundy Street. Napier Place was bounded upon the east by Victoria Road, and upon the west by the piece of land conveyed to the defendant in 1854. The plaintiff was tenant for life of all the lands of which J. S. Leigh had died seised.

In 1854, J. S. Leigh being seised in fee of a piece of land lying to the south of Grundy Street and to the west of Napier Place, conveyed it to the defendant in fee, subject to a ground rent. The piece of land conveyed was thus described in the deed: "All that piece of land situate, lying, and being in the township of Kirkdale, within the borough of Liverpool, in the county of Lancaster, and on the east side of Regent Road, south side of Grundy Street, and west side of Napier Place in Victoria Road in Liverpool aforesaid, bounded on the north by Grundy Street, on the east by Napier Place, on the south in part by land formerly

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of the said J. S. Leigh, but now belonging to the Lancashire and Yorkshire Railway Company, and in the remaining part by land lately conveyed by the said J. S. Leigh to the said J. Jack on which the said J. Jack hath erected an iron foundry and other buildings, and on the west by Regent Road aforesaid, and which said piece of land intended to be hereby granted measures in front to Regent Road aforesaid 145 ft., to Grundy Street 252 ft. 6 in., to Napier Place 137 ft. 5 in., and on the south side thereof 297 ft. 10 in., and containing in the whole 4259 square yards of land or thereabouts, being the said several dimensions and quantity a little more and less." The 4259 square yards were the total contents of the land south of Grundy Street, and did not include any portion of the site of that street. On the 19th of March, 1857, the said J. S. Leigh, by deed of that date, conveyed to the Mersey Dock Trustees the piece of land lying to the north of Grundy Street. The material parts of the deed were as follows: "The said J. S. Leigh doth by these presents grant and confirm unto the said trustees of the Liverpool Docks, their successors and assigns, 'inter alia,' all that piece or parcel of land situate in the township of Kirkdale aforesaid, bounded on or towards the south by a public road or street called Grundy Street, ... together with the free use and enjoyment of all the said streets, roads, and passages, for all purposes in common with all other persons lawfully entitled to use the same." The total contents did not include any portion of the site of Grundy Street. On the 30th of March, 1872, the last-mentioned piece of land was by deed conveyed by the Mersey Dock Trustees to the defendant.

Grundy Street and Napier Place were names used to describe certain portions of waste land belonging to J. S. Leigh, and which he had at one time contemplated dedicating to the public as streets, and they were marked as streets on a plan of that portion of the Leigh estates, which he caused to be prepared and hung up in the Leigh Estate Office with a view to the sale or lease of portions of the estate for building. Grundy Street and Napier Place were never in fact used by the public as highways. Save as before stated, J. S. Leigh never dedicated Grundy Street or Napier Place to the public.

Up to the time of the enclosing of Grundy Street by the

defendant, as hereinafter mentioned, Grundy Street was separated from Regent Road by a fence consisting of posts and a swing rail. The fence was repaired and renewed within the twenty years next before this suit and after the purchase by the dock board, both by J. S. Leigh and by the defendant. Immediately after the conveyance to the defendant, executed in 1854, the defendant caused a rough post and rail fence to be put along the northern boundary of Grundy Street for the purpose of defining the said boundary. Immediately after the conveyance executed in 1857 to the Dock Board Trustees, they caused a substantial post and rail fence to be erected along the northern boundary of Grundy Street. Soon after the conveyance of the piece of land in 1854, the defendant erected on it a foundry and ironworks along the southern boundary of Grundy Street, with windows looking out into that street and into Napier Place, and a gateway leading into Napier Place. From that time down to the date of the enclosure in 1872 hereinafter mentioned, the defendant, by placing a quantity of old graving dock materials, screw propellers, and boilers, and refuse from his foundry over the surface of Grundy Street and Napier Place, rendered them impassable for carts and horses. Persons on foot did, however, occasionally down to that date pass along Grundy Street from Victoria Road to Regent Road. In 1865 the defendant enclosed an oblong piece of Grundy Street situate at the west end on the south side. In 1872 the defendant completely enclosed the pieces of land called Grundy Street and Napier Place on the west and east sides respectively.

No complaint was made on behalf of the Leigh family with respect to any of the acts of the defendant until 1875, when the agent of the Leigh estates, in an interview with the defendant, stated that he would report to his employers the fact of the enclosures by the defendant. The action was commenced in April, 1876.

It was contended on behalf of the plaintiff that she was entitled as against the defendant to the possession of the piece of land in respect of which the action was brought. It was contended on behalf of the defendant, first, that he had acquired a title to the land by possession of more than twenty years next before suit; secondly, that by virtue of the deeds coupled with the facts above

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stated, all Grundy Street and the western portion of Napier Place, usque ad medium filum viæ, had been vested in him. If and so far as it was a question of fact, the arbitrator found as a fact that the defendant had not acquired a title by possession and user only to any portion of the land sought to be recovered.

The question for the opinion of the Court was, whether the plaintiff was entitled to eject the defendant from the possession of the land sought to be recovered, or any part of it.

The Exchequer Division (Kelly, C.B., and Cleasby, B.) gave judgment for the plaintiff.

The defendant appealed.

Dec. 8, 11. *C. Russell, Q.C.*, and *W. H. Butler*, for the defendant. The first question is, whether the presumption as to the ownership of the soil of an existing highway extends also to land intended to be dedicated as a highway: that presumption is that the soil to the middle of the highway belongs to the owner of the adjoining enclosed land and passes by his conveyance: *Simpson* v. *Dendy* (1); *Berridge* v. *Ward*. (2) The presumption extends even to the soil of private ways: *Holmes* v. *Bellingham*. (3) The effect of the authorities cited during the argument in *Lord* v. *Commissioners of Sydney* (4) seems to be, that upon a similar presumption of law riparian owners are seised of the bed of a stream ad medium filum aquæ. No doubt the presumption is liable to be rebutted: *Marquis of Salisbury* v. *Great Northern Ry. Co.* (5); and the plaintiff's counsel may rely upon *Plumstead Board of Works* v. *British Land Company* (6); but in that case the land conveyed had been sold in lots. This is an action for the recovery of land: the plaintiff is bound to make out her case: the burden of proof is cast upon her.

[BRAMWELL, L.J. The plaintiff shews that the soil of Grundy Street and Napier Terrace did once belong to J. S. Leigh, through whom she claims, and she challenges the defendant to

(1) 8 C. B. (N.S.) 433, per Willes, J., at p. 472.
(2) 10 C. B. (N.S.) 400, per Erle, C.J., at p. 415, and per Williams, J., at p. 416.
(3) 7 C. B. (N.S.) 329.
(4) 12 Moo. P. C. 473.
(5) 5 C. B. (N.S.) 174.
(6) Law Rep. 10 Q. B. 16.

prove that her title has been defeated by some subsequent event. The burden of proof is shifted.]

Secondly, even if the soil of Grundy Street and Napier Place did not pass ad medium filum viæ by the conveyances executed in 1854 and 1857 by J. S. Leigh, the title of the plaintiff has been defeated by the Statute of Limitations (3 & 4 Wm. 4, c. 27), ss. 2, 3. (1) The plaintiff and her predecessors in title have not occupied the land sought to be recovered for the space of twenty years, and since 1854 the defendant has occupied the soil of Grundy Street by placing thereon the materials used by him. Therefore, the plaintiff and her predecessors have been "dispossessed," and also they have "discontinued possession" within the meaning of that statute.

Herschell, Q.C. (*Gully, Q.C.*, with him), for the plaintiff.

[PER CURIAM. We do not require to hear any argument from the plaintiff's counsel as to the first question urged on behalf of the defendant.]

The second question depends upon the facts stated in the special case, and from these it is clear that the plaintiff and her prede-

(1) By 3 & 4 Wm. 4, c. 27, s. 2, "No person shall make an entry or distress, or bring an action to recover any land or rent but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims, or, if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same."

Sect. 3: "In the construction of this Act, the right to make an entry or distress, or bring an action to recover any land or rent, shall be deemed to have first accrued at such time as hereinafter is mentioned; (that is to say), when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall, while entitled thereto, have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession or at the last time at which any such profits or rent were or was so received."

The Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), which came into operation on the 1st of January, 1879, further limits the time within which actions may be brought for the recovery of land; by s. 1, the period of twelve years is substituted for the period of twenty years; and s. 9 repeals, amongst others, s. 2 of 3 & 4 Wm. 4, c. 27, above set out.

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cessors in title have not been out of possession for the period of twenty years. The acts of the defendant were consistent with the intention of J. S. Leigh, namely, that the soil of Grundy Street should be at some time dedicated to the public as a highway; the defendant only used the land until that intention could be carried out.

[He was then stopped.]

COCKBURN, C.J. As to both the questions argued before us, we think that the contention on behalf of the defendant cannot be sustained.

I will first deal with the question whether the defendant as adjoining owner must be presumed to be seised of the soil of Grundy Street and Napier Place. It is to be recollected that we have to construe conveyances of land situated within a town, and to be used in all probability for building purposes, and lying upon each side of an intended street. I think that the legal presumption as to the ownership of the soil of a highway does not apply to intended streets. That presumption is founded upon a reasonable probability as to the intention of the adjoining owners, and it lays down a principle which has a very convenient operation. It is presumed that those who were seised of the neighbouring land devoted the surface of their soil to the public, in order to confer a common benefit on all those desirous of using the highway, without, however, parting with the ownership of the soil itself. This doctrine applies where the evidence as to the ownership of the soil of the highway has been lost either by lapse of time or from other causes; but in the present case the boundaries of the property conveyed are known, and its extent can be ascertained, and under these circumstances it cannot be assumed that the grantor meant to divest himself of the soil of the road, or that the conveyances were intended to have an operation more extensive than that which their language imported. The presumption relied upon does not apply in the case of a recent grant or conveyance.

The second question depends upon the effect of the Statute of Limitations, and renders it necessary to consider whether the plaintiff or her predecessors in title have been dispossessed of the

soil of Grundy Street and Napier Place. Nothing besides the acts of the defendant has been relied upon as creating a dispossession, and those acts do not amount to a dispossession. I think the conclusion of fact arrived at by the arbitrator right. The plaintiff and her predecessors in title did not intend to abandon the ownership of the soil; it was intended by the parties to the conveyances that a way should run in front of the pieces of land granted by J. S. Leigh, and that subject to this burden the soil should remain in him and his representatives. I do not think that any of the defendant's acts were done with the view of defeating the purpose of the parties to the conveyances; his acts were those of a man who did not intend to be a trespasser, or to infringe upon another's right. The defendant simply used the land until the time should come for carrying out the object originally contemplated. If a man does not use his land, either by himself or by some person claiming through him, he does not necessarily discontinue possession of it. I think that the title of the plaintiff is not barred by the Statute of Limitations.

BRAMWELL, L.J. I also am of opinion that the plaintiff is entitled to succeed.

The first question is, what passed by the conveyances executed by J. S. Leigh? In order to ascertain that, we must look at the surrounding circumstances existing when the pieces of land were granted. If a man sells all his land at Dale, and if the land is bounded by public roads, the soil of the roads passes usque ad medium filum viæ; in like manner if he sells his field at Dale, the soil of the adjoining roads will pass to the grantee; and if by the terms of his grant he states the boundary of his field in popular language, the result will be the same; for it can be properly contended that the vendor did not convey less, than if he had in his grant simply used the word "field." That appears to be the principle which applies to an ordinary conveyance; but how can it apply to the facts before us? At the time when these conveyances were executed, no street existed in fact; before the pieces of land were conveyed, J. S. Leigh might have made the intended street either wider or narrower as he deemed to be more advisable for his remaining property, and upon this state of facts

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a cogent argument arises against the contention for the defendant, namely, that if J. S. Leigh, after the execution of the conveyances, had wished to make the street according to the original scheme, he might have debarred himself from so doing; for his grantees might have interfered to prevent any disturbance of the soil which had passed to them. I think that the case is clear as to the piece of land granted in 1854 and lying upon the south side of Grundy Street; but I own that I have had a misgiving whether the case is equally plain as to the piece of land lying upon the north side. I think, however, that when the surrounding facts are looked at, it becomes manifest that it was not intended to grant the soil of Grundy Street and of Napier Place. The piece of land conveyed by J. S. Leigh in 1857, was described in the deed as "bounded on or towards the south by a public road or street called Grundy Street;" these words may be thus paraphrased, "bounded on or towards the south by a piece of land, which I, the grantor, intend to dedicate to the public, and to call Grundy Street." If the words be read in this sense, it plainly appears that even by the conveyance made in 1857 the soil of Grundy Street ad medium filum viæ did not pass to the grantees.

The second point relates to the true construction of the Statute of Limitations, s. 3. Two things appear to be contemplated by that enactment, dispossession and discontinuance of possession. It is difficult to suppose a case where it can be doubtful whether there has been a discontinuance of possession as to a house; if any chair or table, or other small article of furniture be left, there is strong evidence of an intention that there shall be no discontinuance of possession; but it is possible to conceive a case of discontinuance of possession as to a piece of land where the former owner does nothing to it for the space of twenty years. In the present case, if the plaintiff and her predecessors had done nothing for twenty years to Grundy Street and Napier Place, it might have been possible to argue that there had been a discontinuance of possession. But, after all, it is a question of fact, and the smallest act would be sufficient to shew that there was no discontinuance. The arbitrator has found as a fact that the defendant did not acquire a title by possession and user only to any portion of the land. The arbitrator probably meant that

he stated the facts in order that it might be determined by the Court whether the plaintiff and her predecessors had been dispossessed or had discontinued possession, but that so far as it was a question of fact he found it in the plaintiff's favour. I think that the arbitrator was right, and the circumstance that J. S. Leigh within twenty years before suit repaired the fence separating Grundy Street from Regent Road is strong to shew that there was no discontinuance. I do not think that there was any dispossession of the plaintiff by the acts of the defendant: acts of user are not enough to take the soil out of the plaintiff and her predecessors in title and to vest it in the defendant; in order to defeat a title by dispossessing the former owner, acts must be done which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it: that is not the case here, where the intention of the plaintiff and her predecessors in title was not either to build upon or to cultivate the land, but to devote it at some future time to public purposes. The plaintiff has not been dispossessed, nor has she discontinued possession, her title has not been taken away, and she is entitled to our judgment.

COTTON, L.J. The first question depends upon the construction of the conveyances mentioned in the special case. Neither of them conveys the soil of the street in express terms, but the defendant relies upon a presumption of law by which, he alleges, the soil is vested in him. This presumption is well known: it is assumed, in the absence of express evidence, that the adjoining owners have contributed to the formation of the road, and have dedicated it for the public benefit; it is reasonable, therefore, that when a man grants all his land or all his fields, he should be held to grant also the soil of such roads as may form the boundary of his property, usque ad medium filum viæ. But this doctrine depends upon a presumption which may be rebutted: it applies to existing roads: but no case has been cited where it has been held to extend to a conveyance of land adjoining a piece of land intended to be dedicated as a highway. I think that in such a case as that the grantor remains owner of the soil of the intended road. It may be necessary to do much before the dedication can be

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effected; and if the grantor parts with the soil of the intended road, it may become impracticable to carry out this intention, unless, indeed, the indenture contains a covenant by the purchaser to dedicate the road, which after all affords but an imperfect remedy. It is right to allude to the language of the conveyance executed in 1857: it is not identical with the language of the conveyance executed in 1854, but the difference is not so great as to require us to put a different construction upon it. When the piece of land was granted in 1854, one half of the site of the intended road must have been retained by J. S. Leigh, even according to the view put forward on behalf of the defendant: this circumstance alone renders it doubtful whether the presumption can be applied. It is to be further recollected that although the sites of Grundy Street and Napier Terrace had been marked out, yet no right of way existed over them. I decide this case for the reasons which I have already mentioned, but I wish to remark that I think it very questionable whether the presumption can ever be held to extend to those cases, where land is sold in plots for building purposes, even although the roads have been actually laid out.

As to the second question, which depends upon the Statute of Limitations, I am of opinion that there was no dispossession of the plaintiff or her predecessors by the acts of the defendant. The finding of the arbitrator that the defendant did not acquire a title by possession and user only is important to be considered. In deciding whether there has been a discontinuance of possession the nature of the property must be looked at. I am of opinion that there can be no discontinuance by absence of use and enjoyment where the land is not capable of use and enjoyment. In the present case the property sought to be recovered is a piece of land intended to be dedicated to the public as a road. At one end of it was a fence consisting of a post and rails; within twenty years before action this fence was repaired by J. S. Leigh; this was a user of it sufficient to defeat the operation of the Statute of Limitations. Even if the acts of the defendant could be held to amount to an ouster of the plaintiff and her predecessors in title, there has been a possession by them of the soil of Grundy Street and Napier Place within twenty years.

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Both points which have been raised on behalf of the defendant fail, and the judgment of the Exchequer Division must be affirmed.

Judgment affirmed.

Solicitors for plaintiff: *Gregory, Rowcliffes, & Rawle.*

Solicitors for defendant: *Sole, Turner, & Knight, for T. & W. Dodge & Phipps, Liverpool.*

[IN THE COURT OF APPEAL.]

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May 12.

JONES *v.* BAXTER.

Practice—Application for New Trial—Action commenced in Chancery Division—Divisional Court—Rules of Court, Orders V., rule 4 (a); XXXIX., rule 1—New Trial of Issues.

When an action, commenced in the Chancery Division, has been tried by a jury before one of the judges of a Common Law Division it is thenceforth transferred to the division to which the judge belongs, and an application for a new trial must therefore be made to a divisional Court of that division.

But this does not apply to an action in which an issue has been directed by a judge of the Chancery Division. The action in that case still remains attached to the Chancery Division.

IN this case an action to recover damages for breach of contract was brought in the court of Vice-Chancellor Bacon. The plaintiff, wishing to have the case tried by a jury, set down the case in the general list for Middlesex, and it was tried before Hawkins, J., at Westminster, on the 7th of May, 1880, when the jury found a verdict for the defendant.

On the 11th of May the plaintiff applied to a divisional Court of the Exchequer Division, to which division Hawkins, J., belonged, for an order nisi for a new trial. Their Lordships were willing to make the order, but doubted their jurisdiction, and advised the plaintiff to apply to Vice-Chancellor Bacon. This the plaintiff did, but the Vice-Chancellor was clearly of opinion that the action was now attached to the Exchequer Division, and declined to make any order. The plaintiff renewed the application to the Court of Appeal.

Holt, in support of the application. The doubt is whether the

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plaintiff ought to apply for a new trial to a judge of the Chancery Division in which the action was commenced, or to a divisional Court of the Common Law Division to which Hawkins, J., belongs. The decision in *Hunt* v. *City of London Real Property Company* (1) seems to be a distinct authority that he ought to apply to a Common Law Division. But there is a dictum in *Warner* v. *Murdoch* (2) that application in such cases should be made to the Chancery Judge before whom the action was set down.

[JESSEL, M.R. The action has now become attached to the division to which the judge belongs who tried the action. This is the effect of the rule made in March, 1879. Order V., rule 4 a: "If in any action commenced and pending in any one of the Queen's Bench, Common Pleas, or Exchequer Divisions, of the High Court, the trial shall take place before a judge of another of the said divisions, the case shall from that time be transferred to the division of which such judge is a member." So that the action is now transferred to the Exchequer Division. That is just what we decided in *Hunt* v. *City of London Real Property Company.* (1)]

That appears also to have been Mr. Justice Hawkins' opinion at the trial. He said, "We have got the action and we shall keep it; there is a rule to that effect." But the Chancery Division is not referred to in the rule, and Vice-Chancellor Hall has recently heard an application for a rule nisi for a new trial when there had been an issue directed in one of his causes (3)

JAMES, L.J. Where there has been an issue directed, that is done for the Vice-Chancellor's own assistance, and the case is still pending in his court.

JESSEL, M.R. The whole matter was before the Court in *Hunt* v. *City of London Real Property Company.* (1) We thought that the words "tried in" had been left out by mistake from Order XXXIX., rule 1, and we decided that it must be read as if they had been inserted. The old rule contained those words.

JAMES, L.J. The Court in that case thought that it was absolutely necessary to find some mode in which a new trial in

(1) 3 Q. B. D. 19. (2) 4 Ch. D. at p. 755.

(3) See Jenkins v. Morris, 14 Ch D. 674

an action originally set down in the Chancery Division could be obtained, and they could not find any other place except the Common Law Divisional Court. It seemed to the Court that that was the reasonable and necessary interpretation of the Orders. I concur in that view, and I think that the expression of our opinion in the present case will be sufficient to induce the Exchequer Division to retain the matter which is before them.

BAGGALLAY, L.J., concurred.

JESSEL, M.R. It must be understood that our decision does not apply to the case of an issue directed by a judge of the Chancery Division.

Solicitor: *W. Crook.*

COLLEY AND ANOTHER *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY AND THE GREAT WESTERN RAILWAY COMPANY. *May* 11.

Railway—Accommodation Works—Damage arising from Insufficiency—Right of Action excluded by Statutory Remedy—Railways Clauses Consolidation Act, 1845 (8 *Vict. c.* 20), *ss.* 68–73.

A railway company constructed a culvert to carry off water from land adjacent to the railway. No complaint was made by the owner of the land of the insufficiency of the culvert, and no application was made to justices for additional accommodation works within the five years limited by the Railways Clauses Consolidation Act, 1845, s. 73. An injury having subsequently arisen to the land from the insufficiency of the culvert to carry off all the water, an action in respect of such injury was brought by the occupier against the railway company in which it was alleged that the culvert was insufficient:—

Held, on demurrer, that the action would not lie.

DEMURRER to a reply.

The statement of claim alleged that the plaintiffs were tenants of a farm and the defendants railway companies; that before the construction of the culvert hereinafter mentioned the farm was drained as of right by a natural watercourse; that the Shrewsbury and Hereford Railway Company, which undertaking afterwards became vested in the defendants, pretending to act in the execution of certain powers conferred upon them by authority of

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Parliament, constructed about the year 1853 a culvert upon the farm for the purpose of carrying the water from it and draining it through another channel, and that the culvert was constructed in an insufficient manner so as not to carry the water from the farm, and the defendants had allowed the culvert to remain an insufficient culvert, whereby in 1879 damage had accrued to the plaintiffs by reason of the flooding of their land.

The parts of the statement of defence and reply material to the decision were—

Statement of defence: "5. The making of a culvert for the purposes mentioned in the statement of claim was an accommodation work within the meaning of ss. 68 to 73 (both inclusive) of the Railways Clauses Consolidation Act, 1845, and the questions in this action relate, not to the maintaining or repairing but to the making of a proper culvert, and if no sufficient culvert was made by the Shrewsbury and Hereford Railway Company during the construction of the railway the plaintiffs and their lessors, or the predecessors of the plaintiffs in occupation or of their lessors in title, ought to have proceeded in accordance with the provisions of the said sections and not otherwise, and this action is not maintainable."

Reply: "2. As to paragraph 5 of the defence, that this action is brought to recover damages for the injuries to the plaintiff's property set out in the claim, and not to compel the defendants to make any further or additional accommodation works under the Railways Clauses Consolidation Act, 1845, ss. 68 to 73 (both inclusive) or any or either of them."

To this reply the defendants demurred.

R. S. Wright, for the defendants. The question is not of the maintaining or repairing this culvert, but whether it was a sufficient one when made. If it was not, the remedy of the landowner was that which is given by the Railways Clauses Consolidation Act, 1845 (8 Vict. c. 20), in ss. 68 to 73. The plaintiffs had five years under s. 73 in which they might have applied to have insufficient works altered, and they cannot now sue the defendants.

J. O. Griffits, Q.C. (*Barnard*, with him). The statute does not

take away the common law rights of the parties, and this case is one of those in which, a party using his land for a proper purpose, an action lies only when an injury arises to neighbouring land. *Whitehouse* v. *Fellowes* (1) was a case under the Turnpike Acts' under which actions are to be brought within three months of the doing the act complained of, yet the Court held that an action would lie if brought within three months from the accruing of damage caused by an alteration of a culvert, though more than three months had elapsed since the alteration was made. So here there was nothing illegal and no negligence in the making the culvert, and no action would lie till damage arose from the insufficiency of the culvert, but when the damage arises there is nothing in the statute which restricts the right of the plaintiffs to sue.

R. S. Wright, was heard in reply.

KELLY, C.B. I am clearly of opinion that the defendants are entitled to the judgment of the Court. The case of *Whitehouse* v. *Fellows* (1) depended upon the Statute of Limitations, and any cases as to the right to claim damages for an injury done to one person by the mode in which another person may use his property which happens to be contiguous to the land of the first, are cases quite sui generis, and have no connection with the case now before the Court. Here the railway company were empowered to make a culvert. That was some twenty years or more ago. They made it, and if they had made it in such a way as necessarily and at once to occasion injury to the owner of the adjoining land, the remedy would have been obvious and immediate. The sections of the statute which have been referred to shew that it would only have been necessary to apply to the justices, and they would have taken care that the culvert was made in a proper as well as in a sufficient manner. No such application was made, and this is not a use by the defendants of their property in such a way as to injure the property of an adjoining landowner. It is in fact a damage resulting from an alleged non-compliance with an Act of Parliament, which Act of Parliament was in all respects lawfully complied with at the time the works were erected. Under these

(1) 30 L. J. (C.P.) 305.

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circumstances it is perfectly clear the defendants are not liable, and the judgment must be for the defendants, with costs.

Judgment for the defendants.

Solicitors for plaintiffs: *Twisden, Parker, & Co.*
Solicitor for defendants: *R. R. Nelson.*

June 5.

[IN THE COURT OF APPEAL.]

ASHDOWN *v.* INGAMELLS.

Damages, Measure of—Agreement to sell Property in Consideration of Payment of Debts—Insolvency of Vendors—Action by Trustee for Breach of Contract—Nominal Damages.

A. & S., being traders in embarrassed circumstances, sold their business to the defendant upon condition that he should pay certain debts owing by them. This he failed to do, and left a balance of 1750*l.* unpaid to the creditors of A. & S. A. & S. afterwards liquidated their affairs by arrangement under the Bankruptcy Act, 1869, and the plaintiff having been appointed trustee, brought an action for breach of contract:—

Held, that he was entitled to recover the sum of 1750*l.*, and not merely nominal damages.

Porter v. *Vorley* (9 Bing. 93) disapproved of.

THE following are the material portions of the claim:

The plaintiff was the trustee of G. F. Allin & C. F. Smith, whose affairs were liquidated by arrangement under the Bankruptcy Act, 1869, s. 125: they had carried on business in Southwark as fruit and potato salesmen. In the autumn of 1878, Allin & Smith, being in embarrassed circumstances, applied to the defendant for assistance, and the following agreement was entered into:—

"Agreement between G. F. Allin, & C. F. Smith, of the one part (hereinafter called the vendors), and Clark Ingamells, of the other part (hereinafter called the purchaser), as follows:—

"1. For the considerations hereinafter mentioned, the vendors agree to assign the lease of the premises in one of the railway arches, Stoney Street, Borough Market, now held by them, and the goodwill of the business of potato and fruit salesmen carried on by them therein, and all the stock-in-trade, vans, horses, office

furniture, and effects belonging to the said vendors, and employed in the said business, and all the book debts now owing to the vendors, to the purchaser absolutely, and to deliver him possession of the same.

"2. The purchaser agrees to pay Mr. Harrison, a creditor of the vendors, 10*s.* in the pound, in payment and satisfaction of his debt not exceeding 400*l.* The purchaser agrees to pay all the trade debts, or to arrange with the creditors, including the debt owing to the purchaser for money lent.

"3. The balance of the bank (if any) is to be received and taken by the purchaser, and the acceptances held by Harrison, or given to him, are to be delivered up on payment to him of the 10*s.* in the pound.

"4. The purchaser will not undertake the payment of any debts or acceptances not herein mentioned.

"5. All the household furniture and effects belonging to the vendors are not included in the aforesaid sale.

"6. The vendors will forthwith hand to the purchaser all the books, and afford every assistance and explanation to him in obtaining payment of the debts, and the purchaser is to be at liberty to use the names of the vendors in any proceedings for the recovery of the debts, he indemnifying the vendors against all costs."

Allin & Smith performed the agreement on their part, and the defendant entered into and took possession of the property, effects, and premises comprised in the agreement, and carried on the business, and received and collected moneys in respect of the same.

The defendant paid or arranged the debts due to several of the creditors of Allin & Smith, including a debt of about 400*l.* due to one J. Harrison, but he had refused to pay, nor had he ever paid, the other trade debts which were then due and owing by Allin & Smith, nor did he ever arrange with the persons who were then their creditors according to the tenor of the agreement. The defendant always had notice that the property assigned to him comprised substantially the whole of the estate and property of Allin & Smith, and that the result of his refusing to carry out the agreement on his part, or to pay and arrange the debts, would

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be to oblige them to institute proceedings for the liquidation of their affairs. By reason of the defendant's default, Allin & Smith in November, 1878, were obliged to present a petition for the liquidation of their affairs, and their creditors resolved that their affairs should be so liquidated. The amount of the trade debts and creditors' claims, exclusive of the debt due to the defendant, which the defendant should have paid or arranged, was 1750*l.* or thereabouts, and the trade and other creditors had proved for the same, or claimed, or given notice of their claims under the liquidation. The trade and other creditors, whose debts and claims the defendant should have paid or arranged according to the tenor of the agreement, were mainly the only creditors of Allin & Smith.

The defence, after alleging the defendant had been induced to enter into the agreement by the fraud of Allin & Smith, contained the following paragraph: "The defendant, as to the whole statement of claim, brings the sum of one shilling into court, and says that beyond such sum the plaintiff has sustained no damage by reason of the facts stated in such statement of claim, and that such sum is sufficient to discharge the plaintiff's claim."

The action came on for trial before Huddleston, B., and a jury, when the objection was taken that even if the plaintiff proved all the averments in the claim he could recover only nominal damages, and that the defendant had paid one shilling into court. It was thought better to determine this point first, and the jury were discharged, and the case was reserved for further consideration. The action was heard upon further consideration by Huddleston, B., and his Lordship, after argument, in which *Porter* v. *Vorley* (1) was cited, delivered the following judgment:—

HUDDLESTON, B. The contract was that the defendant should pay, not Allin & Smith, but their creditors. No doubt the right to sue primâ facie passed to the trustee, but he must shew damage of such a character as will enable him to recover a substantial amount. There is no authority to shew that the fact of driving Allin & Smith into liquidation is a ground for damages; and there is nothing to shew that their estate in liquidation is diminished.

(1) 9 Bing. 93.

In substance the only creditors are those whom the defendant has not paid. I think that the plaintiff is only entitled to nominal damages, and that the one shilling paid into court is sufficient. The judgment must be for the defendant.

The plaintiff appealed.

De Gex, Q.C. (*Holmes Poulter*, with him), for the plaintiff. When Messrs. Allin & Smith became insolvent, all rights of action vested in them passed to the plaintiff as their trustee, who is entitled to say that, if he recovers as damages the sum which the defendant ought to have paid to the creditors, he will be able to pay a dividend to the creditors in the liquidation. The trustee alone can sue upon the agreement, the creditors, for whose benefit it was entered into, cannot. If the contention for the defendant is correct, the estate of Messrs. Allin & Smith upon their liquidation was presented to the defendant, who thereby became absolved from all liability to further payment. *Carr* v. *Roberts* (1) is a strong authority in the plaintiff's favour. For the defendant reliance was placed upon *Porter* v. *Vorley* (2), and upon the authority of that case Huddleston, B., decided in his favour; but that decision does not appear to have been approved of in *Hill* v. *Smith*. (3)

Lush-Wilson, for the defendant, was called upon to argue. The estate of Messrs. Allin & Smith has not been diminished by reason of the defendant's breach of contract, for he himself was to pay the creditors. If the defendant had literally fulfilled his contract, the assets passing into the plaintiff's hands would not have been increased. In *Carr* v. *Roberts* (1) the plaintiff sued as an administratrix, and the rights of an administrator are larger than those of a trustee in insolvency. The only damage that could arise from the defendant's breach is, that the liabilities of the estate, which has become vested in the plaintiff, are not diminished; and this is insufficient to support a claim for substantial damages.

De Gex, Q.C., did not reply.

BRAMWELL, L.J. I think that this judgment must be reversed.

(1) 5 B. & Ad. 78. (2) 9 Bing. 93.
(3) 12 M. & W. 618.

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With all respect to my Brother Huddleston, I really cannot agree with him. The defendant undertook to the liquidating debtors to pay for them certain debts. It is alleged that he has not done so, and has refused to do so. If this allegation is correct, the contract has been broken. It is not a contract that can be performed at any time. If it is not performed within a reasonable time it is broken, and broken for ever. The defendant cannot now perform it; all that he could do now would be to mitigate damages by making the payment he agreed to make. If the liquidating debtors had not become insolvent, they clearly would have been entitled to recover by way of damages the sum which the defendant ought to have paid, but did not pay. That being the position of the parties, how can it be possible that the trustee in liquidation is not entitled to recover the sum which the defendant omitted to pay? The plaintiff, who is the trustee in liquidation, must have a right to the same amount as the liquidating debtors would have been entitled to, if they had continued solvent and had brought an action for breach of contract.

It is unnecessary to treat of the authorities at length; but I may say that *Carr* v. *Roberts* (1), cited on behalf of the plaintiff, is in point. That was an action upon a covenant to indemnify. Here the agreement is not merely to indemnify the liquidating debtors but to pay the debts due by them. The distinction however, is immaterial. At first sight *Porter* v. *Vorley* (2) appears to support the contention for the defendant; but it is clear to me that the Court of Exchequer, in *Hill* v. *Smith* (3), did not approve of it; and, moreover, the facts in it were very different from those before us. There a phaeton had been injured by the defendant's negligence, and the true owner might at any time have demanded that the defendant should pay for the repair of the damage, not on account of any contract existing between them, but on account of the injury which the true owner had sustained. The damage to the phaeton might have been treated as a tort. I must confess, however, that I feel a very great distrust as to the propriety of that decision, because if the person from whom the defendant had hired it had remained solvent, he would have been entitled to

(1) 5 B. & Ad. 78.
(2) 9 Bing. 93.
(3) 12 M. & W. 618, p. 631.

recover full damages. Upon the other hand, *Carr* v. *Roberts* (1) seems to me rightly decided.

Upon these grounds I am of opinion that the judgment appealed against must be reversed.

BAGGALLAY, L.J. As the other members of the Court entertain a clear view as to what should be done in this case, any doubt which I may entertain is immaterial. I do feel a doubt as to what should be the ultimate result of this litigation; though I am not satisfied that the grounds of the decision of Huddleston, B., upon the materials before him, were wrong. As the question has been brought before us, it has been in effect an appeal from a judgment upon a demurrer to a statement of some only of the material facts; the whole case will, however, be raised in a more convenient form after all the questions raised by the pleadings have been tried. I therefore think it better to adopt the view of my colleagues, and to hold that the appeal should be allowed.

BRETT, L.J. This action is brought by a trustee for the breach of a contract made with liquidating debtors, and the case has now to be considered as if the only defences had been a traverse of the agreement and of the breach, and as if at the trial it had been found that the agreement had been entered into and that the breach had been committed: the question would then arise as to the amount of the damages: are they only nominal or substantial? Now the contract relied upon is a contract entered into by the defendant with the liquidating debtors for the purchase of their business upon certain terms. Suppose that one of those terms had been that the defendant should pay to the liquidating debtors the sum of 1750*l.*: it is clear that upon their insolvency the plaintiff, as trustee, suing for the breach of the contract would be entitled to recover the sum of 1750*l.*: but the contract was not in that form, the purchase-money was not to be paid in that way, it was not to be paid to the liquidating debtors directly, but to be devoted to the satisfaction of debts owing by the insolvents to other creditors. It is obvious that there was no contract between the defendant and those creditors; the only contract was between the defendant

(1) 5 B. & Ad. 78.

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and the liquidating debtors. If there had been no insolvency, the defendant would have committed a breach of contract by not paying off those creditors. What would have been the damages recovered? They would have been the sum of 1750*l.*, the amount of the unpaid debts. The liquidating debtors would have recovered that sum, because it was part of the contract between them and the defendant, that he should distribute that sum amongst the creditors. If that be so, I can see no principle upon which the trustee may not sue for the breach of that contract, and may not recover the same damages as the insolvents could have recovered: in my opinion it is a general principle that where an action is brought for the breach of a contract, the trustee in bankruptcy or liquidation is entitled to recover the same amount of damages for the breach of the contract, as the bankrupt or insolvent himself would have recovered. It seems to me that *Carr* v. *Roberts* (1) shews distinctly that this proposition is true. It is said that *Porter* v. *Vorley* (2) is an authority to the contrary: I do not think it necessary to determine what principle was decided there. In *Hill* v. *Smith* (3) the Court of Exchequer treated *Porter* v. *Vorley* (2) in the manner in which judges often treat the decision of a Court of co-ordinate jurisdiction which they do not like: the judgment was delivered by Parke, B., and his Lordship said (p. 631): "The circumstances of it were very peculiar," that was as much as to say: "If ever I find a case of exactly the same circumstances, I will take notice of the decision; but if I do not, I will not." In my opinion *Porter* v. *Vorley* (2) was wrongly decided.

BRAMWELL, L.J. The effect of our decision is that the case will go back to Huddleston, B., who will try the other questions raised in the action: the costs of the first trial to be costs in the cause, the costs of the appeal to be the plaintiff's costs.

Judgment reversed.

Solicitor for plaintiff: *George H. Finch.*
Solicitor for defendant: *Walter Justice.*

(1) 5 B. & Ad. 78. (2) 9 Bing. 93.
(3) 12 M. & W. 618.

[IN THE COURT OF APPEAL.]

1880
June 17.

FLETCHER *v.* HUDSON.

Local Board—Acting as Member after Disqualification—Action for Penalty—Party aggrieved—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 253, *sch.* 2, *rule* 70.

By the Public Health Act, 1875, s. 253, proceedings for the recovery of a penalty under that Act shall not, "except as in this Act is expressly provided," be taken by any person other than a party aggrieved, or a local authority, without the consent of the Attorney General; and by Rule 70 of Schedule II. (which by s. 317 is to be read as part of the Act) a penalty is imposed upon any person acting as a member of a local board without qualification, such penalty being by the same rule made recoverable by any person:—

Held, affirming the judgment of the Exchequer Division, that the provision of rule 70 that the penalty might be recovered by any person was an "express provision" of the Act, within the meaning of s. 253, and that consequently in actions for penalties under that rule the consent of the Attorney General was not necessary.

APPEAL from an order at chambers.

The plaintiff in his statement of claim alleged that he was the rector of Grasmere, and a ratepayer of the district of the Grasmere Local Board, and interested in the rates raised in the district and the contracts entered into by the local board, and was aggrieved by the defendant acting as a member of the local board while under disqualification, and he sued for a penalty of 50*l.*

The Public Health Act, 1875, s. 253, enacts that "proceedings for the recovery of any penalty under this Act shall not, except as in this Act is expressly provided, be had or taken by any person other than by a party aggrieved or by the local authority . . . . without the consent in writing of the Attorney General." The application was made at chambers to stay proceedings on the ground that the consent of the Attorney General was necessary and had not been obtained. Bowen, J., made the order to stay.

May 25. *Cock*, for the plaintiff, moved to set it aside. The plaintiff brings the action under Sched. II. Rule 70 of the Act. That rule enacts that "any person who not being duly qualified as a member of the local board . . . . or being disqualified from acting by any provision of the Act, acts as such member shall be liable to

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a penalty of 50*l.*, which may be recovered by any person, with full costs of suit by action of debt." This is perfectly general and being an express provision (since by s. 317 the schedule is to be read as part of the Act) is exempted in express terms from the operation of s. 253, and no consent is necessary although the person bringing the action is not a party aggrieved. [He referred to *Rochfort* v. *Atherley*. (1)]

Crompton, for the defendant. This is a penalty recoverable under the Act and s. 253 must apply to it. The words of that section are perfectly general, and reading the Act and this schedule together will govern and limit the expression "any person" used in the rule.

HUDDLESTON, B. I am of opinion that this appeal must be allowed and the order made at chambers set aside. It was contended on the part of the plaintiff that the proceedings are taken under Sched. II. Rule 70, and that the plaintiff was a person entitled to bring an action though no consent of the Attorney General had been obtained as required by s. 253. I think this is the correct construction. The rules are to be read as part of the Act, and rule 70 comes within the exception in s. 253, since by the rule it is "expressly provided" that any person may sue. The terms of s. 253 therefore do not apply to an action brought under rule 70, and the consent of the Attorney General is not necessary.

STEPHEN, J., concurred.

The defendant appealed.

June 16, 17. *W. G. Harrison, Q.C.*, and *Crompton*, for the defendant. The plaintiff here is not a party aggrieved. He merely alleges that he is a ratepayer; but that is not enough; one ratepayer is not more aggrieved than another, and surely all the ratepayers in the district could not bring actions simultaneously. The same objection which applies to an action being brought for nuisance to a highway by a member of the public who has suffered no special damage, applies with equal force here. On this point the case of

(1) 1 Ex. D. 511.

Boyce v. *Higgins* (1) is an express decision in the defendant's favour. As also is that of *Hollis* v. *Marshall.* (2) But if he is not a party aggrieved, then the consent of the Attorney General is a condition precedent to his right to sue. It was so held by Lord Coleridge, C.J., and Pollock, B., in *Smith* v. *Fieldhouse.* (3) The attention of the Court below was not directed to that case. Sect. 253 requires consent except where there is an express provision to the contrary, but rule 70 is not an express provision to the contrary; the words, "by any person," mean nothing at all, they might just as well have been left out. The very same words were used in the corresponding section of the Public Health Act of 1848, but in the cases of *Hollis* v. *Marshall* (2) and *Boyce* v. *Higgins* (1), above referred to, which were decided under that Act, it was held that notwithstanding those words the consent of the Attorney General was necessary. The policy of the legislation was repressive of common informers; and there is an especial reason for requiring consent of the Attorney General in this case, for here the penalty is recoverable by action of debt, and the judge at the trial would have no power to reduce the amount. In the case of penalties which are recoverable summarily, the justices need not inflict the full amount; but if in such case consent is necessary, as admittedly it is, à fortiori is it necessary here.

Charles, Q.C. (*Cock*, with him), for the plaintiff. First, the plaintiff is a party aggrieved. Any one of such a limited class as that of ratepayers is a party aggrieved, if by reason of the act complained of he has to pay more rates, or even if there is merely a chance of his having to pay more rates. This is not like the case of a member of the general public suing for an injury to the highway, the class to which the complainant here belongs is a limited one. The cases, it is true, of *Boyce* v. *Higgins* (1) and *Hollis* v. *Marshall* (2) are against the plaintiff's contention, but those cases are not binding on this Court, and the Court is asked to overrule them. Secondly, even if the plaintiff is not a party aggrieved, the consent of the Attorney General is unnecessary. The words, "by any person," in rule 70 are an express provision to that effect. No doubt it was held otherwise in the cases of

(1) 14 C. B. 1.

(2) 2 H. & N. 755.

(3) 35 L. T. (N.S.) 602.

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Hollis v. *Marshall* (1) and *Boyce* v. *Higgins* (2); but in the Act of 1848, under which they were decided, there were no words of exception in the section requiring the Attorney General's consent. The words, "except as is in this Act expressly provided," are to be found for the first time in the Act of 1875, and were there introduced for the very object of meeting those decisions. The only authority against the plaintiff's contention is *Smith* v. *Fieldhouse*. (3) But that was only a motion for a rule nisi, and probably was not fully argued. Moreover the case is not reported in any other reports. If necessary, the Court will overrule it. Thirdly, the penalty here sued for is not a penalty within the meaning of s. 253. That section must be read in connection with the rest of the group of sections in which it is found, and its operation was intended to be confined to penalties recoverable by summary proceedings; whereas the present penalty is recoverable by action of debt.

Crompton, in reply. The words, "except as is in this Act expressly provided," were inserted ex abundanti cautelâ—they were not intended to meet any particular case.

BRAMWELL, L.J., I think the judgment must be affirmed, though I confess I say so with the greatest hesitation and doubt.

I think the words, "except as in this Act expressly provided," must mean "except where there is an express provision that some person may sue who is neither a party aggrieved, nor a local authority, nor a person acting with the consent in writing of the Attorney General." In other words, sect. 253 may be read thus: proceedings may be taken by a party aggrieved, they may be taken by a local authority, they may be taken by a person who has the consent of the Attorney General, and lastly they may be taken by any person who, not being one of the preceding, is expressly authorized to do so. Now, I find in the Act three cases (there may be more) in which such persons are expressly so authorized, namely, ss. 192 and 193, and rule 70; in each of them it is provided that the penalty may be recovered by any person. By s. 192 a person holding simultaneously the offices of treasurer

(1) 2 H. & N. 755. (2) 14 C. B. 1.
(3) 35 L. J. (N.S.) 602.

and clerk is rendered liable to a penalty of 100*l.* recoverable by any person by action of debt. By s. 193 the penalty imposed upon an officer or servant of the local authority for being interested in any contract with the authority is made recoverable by any person by action of debt. And again by rule 70 of Schedule II., under which the present action is brought, the penalty is also recoverable by any person by action of debt. The other sections of the Act which impose penalties either give the penalty to the party aggrieved or do not say who is to recover them. In such cases the consent of the Attorney General would be necessary. But in the three cases to which I have referred it is expressly said that any person may sue, and there I think consent would not be necessary. If this was not the intention, the words "by any person" would be unmeaning, and might just as well have been left out. It is, moreover, to be observed that there is this difference between the penalties imposed by ss. 192, 193, and rule 70, and those imposed by other sections, that the former are for offences committed by the members of the local board or their servants, while the latter are not. And possibly the legislature may have thought that, considering the large powers which the board and their servants have, and their opportunities for abusing those powers, and considering the necessity which there consequently is for keeping such board and servants in order, it is unadvisable to impose any such check upon the recovery of penalties against them as that of requiring the previous sanction of the Attorney General to the action being brought. Whether that was their reason or no, I cannot say. Or perhaps the object of the Act may have been this—(I take it for granted that the local authority may sue in all cases in which the offences are committed by persons other than themselves)—the legislature may have meant that where the local authority can sue and do not, it is a suspicious case if a common informer comes forward; but that does not apply where the local authority are themselves the offenders.

As to authorities, we have opinions of judges both ways; on the one hand Lord Coleridge and Pollock, B., in *Smith* v. *Fieldhouse* (1), and Bowen, J., in the present case, thought that consent

(1) 35 L. T. (N.S.) 602.

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was necessary; on the other, Huddleston, B., and Stephen, J., in the Court below, thought that it was not. Having to choose between them, I prefer the opinion of the Court below.

I confess, however, that I have extreme doubt whether the words, "except as is in this Act expressly provided," have not crept into the Act by accident, without any intention to dispense with consent of the Attorney General, whether, that is to say, they were not put in merely ex majore cautelâ.

BAGGALLAY, L.J. I agree that the judgment of the Court below must be affirmed. In this Act there are a large number of sections creating offences and imposing penalties for their commission; and these offences the Act seems to divide into two classes: first, those which may be committed by persons other than the members or servants of the local board; and, secondly, those which may be committed by the members or servants of the local board themselves. In the case of offences of the first class, there are only three kinds of persons who may recover the penalties, viz., a party aggrieved, a local authority, or a person with the consent in writing of the Attorney-General; and then only by summary proceedings under the Summary Jurisdiction Acts; in the case of offences of the second class any person may recover them, and by action of debt. The Act seems to draw a distinction between these two classes of offences, both as regards the persons to recover and also the mode of proceeding for the recovery. And I think the legislature had this distinction in their minds when they introduced into s. 253 the words "except as is in this Act expressly provided." I think that ss. 192 and 193 and rule 70, which deal with offences committed by members or servants of the local board, contain express provisions that in the cases there dealt with any person may sue without the consent of the Attorney General, and that it is to those provisions that the words of exception in s. 253 were intended to refer. I confess that it appears to me to be very reasonable that, considering the large powers that the board have of dealing with the rates, there should be wider means of punishing offences committed by them than of punishing those committed by other people.

BRETT, L.J. I am sorry to say that I cannot dissent. I hope the House of Lords may be more bold. I cannot read this section grammatically, I can hardly read it sensibly. I suspect that those who drew the section intended to put a bridle upon common informers; but some one out of great caution has introduced an exception, to which I can give no meaning, unless it is the meaning given by Lord Justice Bramwell. I very much doubt whether that is the meaning which the legislature intended, but we must construe Acts of Parliament according to the well recognised rules of construction.

Order to stay proceedings rescinded.

Solicitors for plaintiff: *Iliffe, Russell, Iliffe & Cardale.*
Solicitors for defendant: *J. & E. Scott.*

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June 2.

Contract—Representations influencing Conduct—Mutuality—Interest in Lands—Statute of Frauds, s. 4—Executed Consideration.

A representation, which influences the conduct of a person to whom it is made, is not legally enforceable against the person who makes it unless it operates either as a contract or as an estoppel.

The plaintiff, as heir-at-law of an intestate, claimed the title deeds of the intestate's farm, of which the defendant had taken possession on his death. The defendant counter-claimed a declaration that she was entitled to a life estate in the farm, and to retain the title deeds for her life. The jury found that the defendant was induced to serve the intestate as his housekeeper without wages for many years, and to give up other prospects of establishment in life, by his promise to make a will leaving her a life estate in his farm, if, and when, it became his property:—

Held, by Stephen, J., first, that the finding, taken with the facts, amounted to a finding that there was a contract to the above effect between the intestate and the defendant, and that such a contract being based on a good consideration (whether it could or could not have been enforced by the intestate) was binding on him and his estate; and, secondly, that, since the contract had been completely performed on the defendant's part, s. 4 of the Statute of Frauds did not apply; and that the defendant was entitled to the declaration asked in the counter-claim.

Cases 1 QBD 314 Ca. 8 App. Cas 467. HL

THE facts proved at the trial before Stephen, J., and the arguments employed on the further consideration appear from the written judgment of the learned judge.

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May 18, 1880. *Bagshawe, Q.C., Gainsford Bruce,* and *Ridley,* for the plaintiff.

H. F. Bristowe, Q.C., Waddy, Q.C., and *J. Edge,* for the defendant.

June 2. STEPHEN, J. This case was tried before me at the Durham Summer Assizes in 1879, and was reserved by me for further consideration.

The statement of claim alleged that the plaintiff was brother and heir-at-law of Thomas Alderson, deceased, who died intestate on the 15th of December, 1877, and in whose service the defendant, Elizabeth Maddison, had lived as housekeeper for many years before his death. Thomas Alderson, at the time of his death, was owner in fee of an estate called Manor House Farm, and on his death his property descended to the plaintiff as his heir-at-law. The defendant took possession on Thomas Alderson's death of the title deeds of the property. The plaintiff claimed the restitution of the title deeds and damages for their detention.

The statement of defence admitted in substance the allegations of the statement of claim, but stated in some detail that Thomas Alderson becoming indebted to the defendant for wages, and wishing her to remain in his service, made an agreement with her to the effect that if she would forbear to press him for the arrears of wages due to her, and would serve him for the rest of his life without wages, he would at his death leave her a life interest in the Manor House Farm. Paragraph 7 of the statement of defence stated that Thomas Alderson, meaning to carry out his promises, made a will by which he left the property in question (subject to a small annuity) to the defendant for her life.

By way of counter-claim the defendant repeated the statements above mentioned, and added that the will referred to, though signed by Thomas Alderson, was not properly attested, whereby he had failed to fulfil his engagements to her. She claimed a declaration that she was entitled to a life estate in the Manor House Farm, or to such life estate as the draft will purported to devise to her, and that she was entitled to retain the deeds for her life. In the alternative she claimed to be entitled to retain the deeds till she had been paid all wages due to her, or fair remuneration for her services.

The counter-claim originally contained an alternative claim to have the real and personal estate of Thomas Alderson administered, and that she might be declared to be a simple contract creditor for the amount of her wages at a fair payment for her services; but in the amended statement of defence this was struck out, so that the only questions before the Court are whether the defendant is entitled to a life estate in the property, and whether she is entitled to a lien on the deeds.

At the trial it was proved that Thomas Alderson had made the will referred to, and that it had not been properly attested, so that as a will it was void.

[After stating the evidence at length the judgment proceeded:—]

I asked the jury at the suggestion of the learned counsel on both sides this question:—

Whether the defendant was induced to serve Thomas Alderson as his housekeeper without wages for many years, and to give up other prospects of establishment in life, by a promise made by him to her to make a will leaving her a life estate in Manor House Farm if and when it became his property? The jury replied, Yes. I reserved for further consideration the effect of this finding and evidence, and the case was argued before me on the 18th of May.

The substantial question in the case appears to me to arise upon the defendant's counter-claim. Has she a right to the declaration for which she asks that she is entitled to a life estate in possession in the property, and to the custody of the deeds for life? If not, I do not see how she can be entitled to a lien upon the deeds for any amount of wages which may be due to her. Indeed it was hardly contended in argument that she was so entitled.

The defendant's case is put in two ways. First, it is said that Thomas Alderson made representations to her which influenced her conduct, and which his heir is bound to make good. Next, it is said that what took place between them amounted to a contract, that in consideration of her serving him for his life he would leave her by will a life interest in the farm, if it became his property during his life and if she survived him. I think that if this was so she is entitled to what is equivalent to specific performance of the contract.

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The law upon the subject is, I think, clear and consistent when all the decisions are considered, but I am led to believe that an impression exists that there may be such a thing as a representation which, though neither a contract nor part of a contract, may have the effect of binding the person who makes it as if it were a contract. I do not agree with this view, and I think it desirable to state fully the way in which the matter presents itself to me. It seems to me that every representation, false when made or falsified by the event, must operate in one of three ways if it is to produce any legal consequences. First, it may be a term in a contract, in which case its falsity will, according to circumstances, either render the contract voidable, or render the person making the representation liable either to damages or to a decree that he or his representatives shall give effect to the representation. Secondly, it may operate as an estoppel preventing the person making the representation from denying its truth, as against persons whose conduct has been influenced by it. Thirdly, it may amount to a criminal offence. The common case of a warranty is an instance of a representation forming part of a contract. *Pickard* v. *Sears* (1) and many other well-known cases are instances of representations amounting to an estoppel. A false pretence by which money is obtained is an instance of a representation amounting to a crime.

Besides these there is a class of false representations which have no legal effect. These are cases in which a person excites expectations which he does not fulfil, as, for instance, where a person leads another to believe that he intends to make him his heir, and then leaves his property away from him. Though such conduct may inflict greater loss on the sufferer than almost any breach of contract, and may involve greater moral guilt than many common frauds, it involves no legal consequences, unless the person making the representation not only excites an expectation that it will be fulfilled, but legally binds himself to fulfil it, in which case he must, as it seems to me, contract to fulfil it.

It will, I think, be found that all the difficulties of the subject may be solved by keeping in mind this classification of the different classes of false representations. Nothing need be said

(1) 6 A. & E. 469.

here of criminal false representations, nor need I on the present occasion say more of false representations amounting to estoppels than that it does not appear to me that the law upon that subject has anything to do with this case. Thomas Alderson neither did nor said anything that could estop either him or his heir from denying any state of facts whatever. He promised to leave his housekeeper a life estate in the Manor Farm. He intended to do so, and had a will prepared which purported to do so. He signed that will in the presence of two witnesses, but unfortunately they were not both present at once, and accordingly the will was void. What relation can estoppels by consent or by statements have to such a case as this? To say that Alderson's heir-at-law is estopped by Alderson's conduct from denying the validity of the irregularly attested will would be to repeal the Statute of Wills, but I do not see what other estoppel would affect the case. Who is to be estopped? What assertion is he estopped from?

The question, therefore, comes to be this: were the representations made to the defendant terms in a contract, or were they merely voluntary revocable promises which were not in fact carried out? In other words, did Thomas Alderson contract with his housekeeper that he would leave her a life interest in the Manor Farm if she would serve him for his life, and if the farm became his property, and if she survived him; or did he induce her so to serve him by making promises not intended to be legally binding? Did she make a bargain, or did she take her chance of his keeping his word?

Before examining the facts of this particular case it will, I think, be well to refer to the decisions which have led me to state the question in this form. I do so because some of the language used in them may seem to countenance the notion that there may be a binding representation which is neither a contract nor an estoppel. I think, however, that when the matter is considered it will be found that, whenever representations have been held to be binding, the circumstances were such as to shew that all the conditions of a valid contract had been fulfilled, and that in all the cases in which representations have been held not to be binding one or more of those conditions were absent.

I understand by a contract an agreement which the law will

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enforce, and I apprehend that, speaking generally, the law will enforce all agreements made upon good consideration or with certain solemnities which dispense with consideration. Agreement and consideration are thus the elements which constitute a contract not under seal. It may seem trivial to mention such obvious matters, but attention to them appears to me to clear up many decisions which are not otherwise very readily explained.

I now proceed to examine the cases referred to, taking first those in which representations were held to be binding, and next those in which they were held not to be binding.

The first case is *Hammersley* v. *De Biel.* (1) The facts were that the brothers, of a lady engaged to be married, wrote by her father's authority a memorandum, part of which was as follows: "Mr. Thomson proposes for the present to allow his daughter 200*l.* per annum for her private use, subject to a possibility of a reduction in that sum in case political or other circumstances should diminish his income: and also intends to leave a further sum of 10,000*l.* in his will to Miss Thomson to be settled on her and her children, the disposition of which, supposing she has no children, will be prescribed by the will of her father. These are the bases of the arrangements proposed, subject of course, to revision; but they will be sufficient for Baron de Biel to act upon." The paper also contained a condition that Baron de Biel was to settle 500*l.* a year on his wife for life. The marriage took place. Baron de Biel made the settlement which he had engaged to make, but the sum referred to was not left in the will, and it was held that it must be settled for the benefit of a child of the daughter.

Lord Cottenham, in delivering judgment as Lord Chancellor on appeal from the Master of the Rolls, said: (2) "I propose first, to consider whether there was any such agreement previous to the marriage as . . . was binding on the late Mr. Thomson to give an additional 10,000*l.* as the portion of his daughter. If it be supposed to be necessary for this purpose to find a contract such as usually accompanies transactions of importance in the pecuniary affairs of mankind, there may not be found in the memorandum or in the other evidence in the cause, proof of any such

(1) 12 Cl. & F. 45. (2) 12 Cl. & F. 61, n.

contract, and this may have led to the defence set up by the defendants; but when the authorities on this subject are attended to, it will be found that no such formal contract is required. A representation made by one party for the purpose of influencing the conduct of the other party, and acted on by him, will, in general be sufficient to entitle him to the assistance of this Court for the purpose of realizing such representation."

This language was adopted by Lord Campbell, in delivering judgment in the House of Lords, and by Stuart, V.C., in the case of *Loffus* v. *Maw*. (1) I am inclined to think that it has been misunderstood, and has been supposed to lay down the rule that, in cases of this kind, a representation not amounting to a contract may be binding on the person who makes it. I do not understand Lord Cottenham to have said anything of the sort. His words appear to me to mean only that contracts of this nature may be made like other contracts by informal documents, or partly by documents and partly by conduct. That this is so is clear from other cases. In *Luders* v. *Anstey* (2) it was held that a letter, making a suggestion as to a settlement, followed by marriage under such circumstances as to imply the acceptance of the suggestion, may be a contract for a settlement. *Hammersley* v. *De Biel* (3) has been followed by several other cases. *Prole* v. *Soady* (4) was in principle similar to *Hammersley* v. *De Biel* (3), and Stuart, V.C., decided it on the authority of that case, of which he said: "There was no more than the expression of an intention to leave this sum" (10,000*l*.) "by a revocable instrument. But inasmuch as the expression of that intention on such an occasion had an influence on the conduct of the contracting parties, and was an inducement to the contract, the House of Lords .... compelled the executors of him who had made the representation to pay the money, and to fulfil that which was expressed as a mere intention. This doctrine, which gives all the force of a binding contract to the mere expression of an intention to do something by an instrument revocable in its nature, is too firmly established to be shaken." This appears to me to be equivalent to saying that the cases establish that an agreement to

(1) 3 Giff. 592; 32 L. J. (Ch.) 49.
(2) 4 Ves. 501.
(3) 12 Cl. & F. 45.
(4) 2 Giff. 1.

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make a will in a particular way may be a binding contract, that it need not be made in any particular form, and that if binding it may be enforced against the representatives of the party making the agreement.

Loffus v. *Maw* (1) is the next case. Its facts are almost precisely the same as those of the case now before me. Gunnell being old and infirm promised Loffus that if she would continue in his service till his death, he would leave her the rents of two houses for her life. He shewed her a codicil to his will which he had made for this purpose; but he afterwards revoked it by a further codicil. It was held by Stuart, V.C., that the trusts in favour of the plaintiff in the codicil which had been revoked should be performed.

The judgment quotes part of the passage already quoted from Lord Cottenham's judgment in *Hammersley* v. *De Biel* (2), and also refers to the well-known case of *Pickard* v. *Sears* (3), as an authority to shew that a man may be bound by a representation made to another person for the purpose of influencing his conduct. For the reasons already given, it seems to me to be simpler and more distinct to say that the case was one of a contract by mutual promises—"If you will serve me I will leave you the rents of two houses." If it is objected that a will is in its nature revocable, the answer is that the cases of *Hammersley* v. *De Biel* (2) and *Prole* v. *Soady* (4) shew that that is no reason why a promise for valuable consideration to make a will should not be a binding contract. This language is I think simpler than that which turns upon representations. If the promise had been, "If you will serve me for a year, I will pay you 20*l.*," the promise to pay the 20*l.* would hardly have been described as a representation which the promisor was bound to make good. I do not know why such terms should be applied to a promise to make a will.

Loffus v. *Maw* (1) is approved of in *Coles* v. *Pilkington* (5), which, however, relates to a different subject. *Coverdale* v. *Eastwood* (6) is a case similar in principle to *Loffus* v. *Maw*. (1) The father of a woman about to be married wrote letters to the mother

(1) 3 Giff. 592; 32 L. J. (Ch.) 49.
(2) 12 Cl. & F. 45.
(3) 6 A. & E. 469.
(4) 2 Giff. 1. 5 Jur. N. S. 1383
(5) Law Rep. 19 Eq. 174.
(6) Law Rep. 15 Eq. 121.

C.W.S.C. 8 Jur. N.S. 607

of the intended husband, in which he said, "V. being my only child, of course she will come into possession of what belongs to me at my decease." "It has been my intention, in the event of the marriage taking place, to make a similar will in accordance with the facts of the case, and of course I should settle my property on my daughter absolutely." These and similar expressions, followed by marriage, were held by Bacon, V.C., to constitute a contract. His words are: "That representations of this kind will constitute a contract is shewn beyond the possibility of question by every case which has been referred to, as well by those in which the contract has been enforced, as by those in which the Court has found it impossible to establish the contract." The result of all these cases appears to me to be that a contract to make a particular disposition of property by will is not invalid merely because a will is revocable, that such a contract need not be made in any particular form (though the provisions of the Statute of Frauds may apply to it) and that the validity of such a contract must be tested by the rules which govern the validity of other contracts.

I now pass to the cases in which representations of intention, whether as to wills or other dispositions of property, have been held not to be binding. All of these are cases in which the language used was considered to amount to nothing more than a declaration of what the parties influenced by it knew or ought to have known to be no more than a present revocable intention. Such declarations, no doubt, in many cases raised natural expectations, which induced the parties to whom they were made to take irrevocable steps; but in each case the decision turned on the question whether the declaration made was intended to form part of a contract, or only to announce a present revocable intention, or (which is the same thing) to make a promise for which there was no consideration.

The first of these cases is *Jorden* v. *Money*. (1) This was a case in which the facts were hard to be ascertained, and were open to various constructions, Lord Cranworth and Lord Brougham differing from Lord St. Leonards in their view of them. When Mr. Money was about to be married, a question arose as to his means, and in particular as to 1200*l.* which he owed to Mrs. Jorden, as

(1) 5 H. L. C. 185; 23 L. J. (Ch.) 865.

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joint obligor on a bond, which in Mrs. Jorden's opinion, had been obtained from him unfairly by a brother of hers, whose personal representative she was. She used language on various occasions which, to say the least, expressed a strong intention not to sue upon the bond, which she said she had abandoned, and Mr. Money was induced to marry by what she said. Afterwards a decree was made by the Master of the Rolls and affirmed by the Lords Justices, that Mr. Money should be released from the bond. It was argued that she had made a representation leading Mr. Money to marry, which she was bound to make good. On appeal to the House of Lords, Lord Cranworth and Lord Brougham were both of opinion that her language amounted at most to a promise not to sue on the bond. Such a promise, made in consideration of Mr. Money's marriage, would have been good as a contract, if the Statute of Frauds had been complied with. The Statute of Frauds not having been complied with, the promise was not binding as a contract, and if regarded as a mere representation, it could not even be said to be false, for it truly represented the state of her mind when she made it. Each judgment, in short, appears to me to proceed upon the principle already stated, that a representation must operate either as a contract or as an estoppel.

Lord St. Leonards took a different view both of the facts and of the law of the case, and part of the language used by him may seem at first sight to imply that a representation not amounting to a contract may have the effect of a contract. According to the view which he took of the facts, Mr. Money's father had certain claims against Mrs. Jorden, which he forbore to urge in consideration of her giving up her claim on his son. This, he said (1), their lordships were "not driven to treat as a contract in the proper sense of the word. It is, however, a representation by one party of an intention" [the word 'not' appears to be here omitted] "to do an act which he refrains from doing in consideration of another party giving up a right to something else, and refraining from doing another act; and I will shew your lordships that that is perfectly good in law, and can be enforced without any legal contract at all." He afterwards says, "He (Mr. Money, the father) says, 'I will not enforce the right against you, which I know I have,

(1) 5 H. L. C. 240.

if you will not enforce your right against my son.' That is a representation which your lordships will presently see the effect of in point of law; but it is a representation that does not depend upon contract; it is not buying and selling, but dealing in representation between parties, a part of the res gestæ of the case up to the time of the marriage." This language does not I think mean more than that the agreement in question was not one of those contracts which have well-known legal names and incidents, like the contract of bargain and sale, but, as Lord St. Leonards states the matter, it was an agreement made upon good consideration and enforceable by law. Such an agreement I should regard as a contract—I know indeed of no definition of a contract which would exclude it.

In a later part of his judgment Lord St. Leonards states that he differs from his colleagues as to the sort of representation which may operate as an estoppel. He supposes them to lay down that (1) "it must be a misrepresentation of the facts, and not a declaration of what you intend to do, or intend to omit to do." The principle, he observes, is that a person is not to be induced to act by deception, whence he infers that "it is utterly immaterial whether it is a misrepresentation of fact as it actually existed, or a misrepresentation of an intention to do or to abstain from doing." If this view were adopted in its entirety, every promise on which a person acted, even if there were no consideration, would be binding by way of estoppel, and such a doctrine would alter the present law by giving legal force to that class of representations which at present are only morally binding. The difference between the classes of misrepresentation which do and do not bind seems to me plain. To say, "I have cancelled this bond," when you have not, is to tell an untruth. To say "I intend to cancel this bond," is to make a statement as to a present revocable intention. If a person chooses to act on such a representation, without having it reduced to the form of a binding contract, he knows, or ought to know, that he takes his chance of the promisor changing his mind, and therefore he is in no worse position if the statement is false when it is made, i.e., if that intention is not really entertained, than if it is true when it is made, i.e., if the intention exists and

(1) 5 H. L. C. 248.

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the person making the statement intends to revoke it if he pleases. I have examined this case at length, because I think that the language I have referred to has contributed to the confusion which has been introduced into the subject, but that, when the whole case is fully considered, it is an authority for the view which I have expressed.

There are several other cases which support the same view. In *Maunsell* v. *Hedges* (1) Mr. Eyre, the uncle of Mr. Maunsell, who was engaged to be married, wrote Mr. Maunsell a letter in which he said, "I have made my will and left you my property in the county of Tipperary, which is considerable." He repeated this statement in another letter, and added, "my county of Tipperary estate will come to you at my death unless some unforeseen occurrence should take place." He refused, however, to make any settlement. In a settlement made by Mr. Maunsell it was recited that he had expectations from Mr. Eyre, and he consented to settle any property which he might receive under his will. The property was afterwards devised to others. It was held in this case that as there was no contract by Mr. Eyre to settle the property, the trustees of the will could not be compelled to convey it to Mr. Maunsell. Lord Cranworth, in his judgment, says (2): "Where a man engages to do a particular thing he must do it: that is a contract; but where there are no direct words of contract the question must be what has he done? He has made a contract or he has not. In the former case he must fulfil his contract; in the latter there is nothing that he is bound to fulfil. . . . Where a person makes a representation of what he says he has done, or of some independent fact, and makes that representation under circumstances which he must know will be laid before other persons who are to act on the faith of his representation being true, and who do act upon it, equity will bind him by such representation, treating it as a contract." He says elsewhere (3): "There is no middle term, no tertium quid, between a representation so made as to be effective for such a purpose and being effective for it, and a contract: they are identical." He adds in reference to *Hammersley* v. *De Biel* (4), "Though you see the

(1) 4 H. L. C. 1039.
(2) 4 H. L. C. 1055.
(3) 4 H. L. C. 1056.
(4) 12 Cl. & F. 45.

word 'representation' used as it is in the speech of Lord Cottenham, I cannot think that it was meant to bear the construction now attributed to it, and to raise any such distinction as is now relied on. That word is no part of the judgment. I must say that I do not think it is a word very happily employed. The only distinction I understand is this, that some words which would not amount to a contract in one transaction may possibly be held to do so in another." He adds, "The circumstances there" (in *Hammersley* v. *De Biel*) "gave to the words used the character of a contract which equity was bound to enforce." The judgment of Lord St. Leonards is to the same effect. He is reported to have said expressly in the course of the argument (1), that *Hammersley* v. *De Biel* (2) was a case of contract. Both Lord Cranworth and Lord St. Leonards point out that in *Maunsell* v. *Hedges* (3) there was no contract at all, and they decide the case on that basis. The cases of *Caton* v. *Caton* (4) and *Dashwood* v. *Jermyn* (5) are illustrations of the same principle. Each is a case in which a promise to make a will, not amounting to a contract, was held to confer no rights upon the promisee after the death of the promisor.

Such being my view of the law, I now come to the question whether in this case there was a contract between the parties. The answer to that question put to the jury certainly does not in plain and direct words affirm such a contract, and it is no doubt to be regretted that the question was not so framed as to give them an opportunity to do so. This is to be attributed to the view taken by the counsel, who were no doubt guided by the case of *Loffus* v. *Maw* (6), and were desirous of bringing this case within the terms of the principle laid down in that case by Stuart, V.C. In substance, however, I think the finding of the jury, especially when it is taken in connection with the evidence of the defendant, is equivalent to a finding that there was a contract. It must be taken that the defendant was induced by a positive promise or series of promises to forego the wages to which she would

(1) 4 H. L. C. 1051, and see p. 1060.
(2) 12 Cl. & F. 45.
(3) 4 H. L. C. 1039.
(4) Law Rep. 2 H. L. 127.
(5) 12 Ch. D. 776.
(6) 3 Giff. 592; 32 L. J. Ch. 49.

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otherwise have been entitled, and to give up a prospect of being married. It is to me inconceivable that she should have done this had she not understood the promises so made to be legally binding. The making of the will to her satisfaction, and the fact that Alderson shewed it to her to see if she was satisfied, are to my mind the strongest possible evidence that such was the character of the transaction. If it had been intended that she was to be at his mercy, he would not have shewn her the will.

It was urged that there was no mutuality, that she might have left his service at any moment, and that he would have had no remedy, and that as every contract implies mutuality there was thus no contract. Upon full consideration I do not agree with this view. Whether he would have had any remedy against her if she had left his service may be a question, but there are many cases in which the consideration on one side must be wholly executed before any obligation arises on the other, and in which the party who gives the first consideration is never under any obligation to give it. In such cases it is impossible that more than one party to the contract should ever sue upon it. Cases in which a reward is offered for information are an illustration. The person who promises the reward can never sue any one for not giving the information, but when the information has been given the promisee can sue for the reward. The doctrine that the solemnity of sealing dispenses with consideration is connected with such obligations as these. A bond is usually given in respect of an executed consideration, which, if there were no bond, would often impose an obligation on the obligor, though he may never have had any right of action against the obligee.

Upon the whole I am of opinion that there was a contract between Thomas Alderson and the defendant to the effect already stated. As it was a contract relating to land it falls within the 4th section of the Statute of Frauds, but as it was completely performed on the part of the defendant, according to the well-known doctrine of equity the application of the statute is barred.

There will be a declaration as prayed in the counter-claim, but as the case is certainly one of difficulty, and one in which the

heir could hardly be expected to concede at once the claim made by the defendant, I think that the costs ought to come out of the estate.

Judgment for the defendant.

Solicitors for plaintiff: *Ridsdale, Craddock & Ridsdale, for Watson, Barnard Castle.*

Solicitors for defendant: *Rogerson & Ford, for Proud, Bishop Auckland.*

[IN THE COURT OF APPEAL.]

Aug. 2.

HARNETT *v.* VISE AND WIFE.

Practice—Costs—Discretion of Judge—Trial by Jury—Rules of Court, 1875, *Order LV.—"Good Cause."*

In exercising his discretion to deprive a successful party of his costs under Order LV., the judge is not confined to the consideration of the conduct of the party in the course of the litigation, but may consider his conduct previous to and conducing to the action. He must, however, assume the truth of the facts found by the jury.

THE action in this case was brought by the plaintiff, who was a doctor practising at Barnet, for a libel contained in a letter written by the female defendant. The plaintiff had been the medical adviser of a gentleman named Perkins, who died about two years before the action, at an advanced age. The plaintiff also acted as the adviser of Mrs. Perkins, his widow, in the management of her property and the investment of her money, and received from her certain sums of money in acknowledgment of his services. Mr. and Mrs. Vise, the defendants, were old friends of Mrs. Perkins, and were annoyed at the manner in which her affairs were managed by the plaintiff, and applied to Mr. Durant, a gentleman in the neighbourhood, who wrote to the plaintiff for an explanation, and eventually took the management of Mrs. Perkins' property.

In July, 1879, Mrs. Perkins had to be removed to a lunatic asylum, and the letter which formed the subject of the action was written to her by Mrs. Vise in September when she was convalescent, warning her against having any further communications

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with the plaintiff, and it was shewn to the plaintiff and two other persons.

The defendants denied the innuendoes alleged in the statement of claim, and pleaded that the letter was a privileged communication, and also pleaded a justification.

The action was tried by Huddleston, B., and a special jury at Westminster in June, 1880, when the judge held that the letter was not a privileged communication, and the jury found a verdict for the plaintiff with 10*l.* damages.

After the trial the counsel for the defendants applied to the judge to exercise his power under Order LV. of depriving the plaintiff of his costs, on the ground that he brought the libel upon himself by his incautious conduct. The judge acceded to the application and refused to allow the plaintiff his costs.

On the 25th of June, 1880,

Tindal Atkinson applied to a Divisional Court of the Exchequer Division, consisting of Huddleston, B., and Stephen, J., to rescind the order of Huddleston, B. He referred to *Harris* v. *Petherick* (1), and submitted that there was no good cause within the meaning of the statute.

HUDDLESTON, B. The case was a very remarkable one. The libel was of a very mild character, but the reason I deprived the plaintiff of his costs was this, that I thought that he had brought the whole thing on himself. The old woman was evidently of very weak intellect, and he had got hold of the whole of her property so as to excite very just suspicion on the part of the neighbours. The defendants appealed to a gentleman of very high position in the neighbourhood, Mr. Durant, and then the plaintiff was induced to give up the money which he had got, and this was a kind letter written by the female defendant to the old woman who was coming out of the asylum, in which she told her all the little chit-chat of the neighbourhood, and said in effect, "Now you are getting well, mind you keep away from that doctor; you know what he brought you to before, and withstand the allurements of those people." That was the libel. The

(1) 4 Q. B. D. 611.

jury took a very strong view of the case and gave a verdict, which, to my mind, was inexplicable, a verdict for the plaintiff, 10*l.* damages. I expressly took time to consider the matter, and I consulted my Brother Stephen in the interval, and I came to the conclusion that it was just the casé intended by Order LV., in which the Court is to interfere for the purpose of preventing the plaintiff from getting his costs.

STEPHEN, J. It seems to me that the intention of the legislature in passing the statute was to give the judge a discretion as to the costs, and that good cause may perfectly well appear at the trial, consistently with the finding of the verdict, why the judge should think that the plaintiff was disentitled to costs. In this case, having regard to what my Brother Huddleston says is the view he took of the facts, it would be consistent with what he says to admit that the jury were perfectly justified in finding the verdict they did, and in finding that the libel was not itself justifiable, and that the plea of justification was not made out, and yet he may have been of opinion—and it seems from what he has now stated that he is of opinion—that the plaintiff had conducted himself in such a manner that if he had been a person with proper feeling he would not have brought the action, and that he brought the whole thing upon himself. That being my opinion, I think he was quite right in depriving the plaintiff of his costs, and when he consulted me upon the subject I expressed that view to him, and told him that in my opinion he, taking that view of the subject, was right in making the order, and I think so now. The application must be dismissed with costs.

From this decision the plaintiff appealed.

July 30. *Watkin Williams, Q.C.*, and *Tindal Atkinson* for the plaintiff. No "good cause" has been shewn within the meaning of Order LV. Those words apply to the conduct of the successful party in the progress of the litigation itself, which may have caused embarrassment or needless expense to the unsuccessful party, and were not intended to give the judge the power of neutralizing the result of the verdict of the jury. In the present case the action was brought to vindicate the character of the plaintiff, and

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he did not press for vindictive damages; and the effect of the verdict for 10*l.* damages was to establish the fact that the letter was a libel, and to exonerate him from the charges contained in it. The judge has in effect set aside this verdict at his own discretion. It was never intended by the legislature to give this power to the judge: *Harris* v. *Petherick* (1); *Garnett* v. *Bradley* (2); *Myers* v. *Defries* (3); *Collins* v. *Welch* (4); *Field* v. *Great Northern Railway Co.* (5); Judicature Act, 1873, s. 67.

Moulton (*Willis, Q.C.*, with him), for the defendants. The construction put by the plaintiff upon the words "good cause" is too narrow. The judge is not confined to a consideration of the conduct of the successful party merely in the progress of the action. If he thinks, that although the plaintiff was legally entitled to a verdict, he had caused the litigation by his imprudent or vexatious conduct, or that there are any other equitable reasons either before or after the litigation has commenced, he has the discretion to refuse him his costs. The judge does not thereby set aside the verdict. Here the general conduct of the plaintiff throughout those transactions with Mrs. Perkins was sufficient to give rise to suspicions entertained by the defendant, and in effect to invite the letter which was written by her. No doubt the verdict of the jury decided that the letter was a libel, and that it was not altogether justified, but the amount of damages shews that they thought the plaintiff's conduct was not entirely without blame. Under these circumstances the judge rightly exercised his discretion under Order LV. of refusing him his costs.

Tindal Atkinson, in reply.

JAMES, L.J. I am of opinion that the jurisdiction as to costs given to the judge by Order LV. is not confined, as has been argued, to the conduct of the parties in the litigation itself. This was not the intention of the Act in creating this new jurisdiction, which is to be exercised "for good cause shewn;" and it is not at all consistent with the language or spirit of the order to assume, as we are called upon to do by the argument on behalf of the plaintiff, that the clause is to be read, as if there were this understood

(1) 4 Q. B. D. 611.
(2) 3 App. Cas. 944.
(3) 5 Ex. D. 180.
(4) 5 C. P. D. 27.
(5) 3 Ex. D. 261.

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condition or proviso: "Provided that in all cases in which in an action for slander or libel a jury shall find a verdict for the plaintiff with damages to the amount of 10*l.*, the judge shall be bound to accept such verdict as conclusively shewing that the plaintiff is entitled to costs." The jury are not judges of the costs of the action; and on the other hand the judge in exercising the jurisdiction given to him by Order LV. must not take upon himself to overrule the verdict of the jury, and has no right to say that the particular thing complained of was not a libel, it being a question of fact for the jury to determine whether there was de facto a libel, and whether there was any justification of that libel. So long as the verdict of the jury remains unchallenged the judge, however he may dissent from the verdict, must not take upon himself to overrule the finding of fact, and say that there was no libel. The verdict therefore is conclusive that there was a libel; and that some part at least of the libel was not justified. But the amount of damages given by the jury is not to be considered as conclusively establishing any remaining matter at issue. Every judge would take it as a material element in considering whether the jurisdiction given by Order LV. is to be exercised or not. But it is the duty of the judge who tried the case, and the duty of the Court of Appeal also, to consider the whole circumstances of the case, everything which led to the action, everything which led to the libel, everything in the conduct of the parties which may shew that the action was not properly brought in respect of the libel complained of.

These are the principles on which this case must be decided. Now the letter in respect of which the action was brought was a long, friendly, gossiping letter not giving any new facts, but merely making references to and comments on matters of common knowledge between the writer and the receiver, with advice as to her future conduct. It almost came within the protection afforded to privileged communications. I am satisfied that this letter never did or could have done the slightest harm to the plaintiff; and further, that it was not the true cause of the litigation. This is shewn beyond a doubt by the lawyer's letter which preceded the action, and which did not refer to the letter itself but to rumours in circulation against the

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plaintiff, which could not by possibility be traced to the letter. The contents of the letter could not have been known by any one beyond two or three persons, unless the plaintiff had himself communicated them. The real object of the litigation was that the plaintiff thought he could avail himself of certain incautious expressions used in this letter to put himself right as to disagreeable rumours current about his conduct. In my view of the case, the letter had no effect in keeping these rumours alive, nor in exaggerating them, but the plaintiff seized the opportunity of dragging this lady and her husband into Court and has succeeded to a certain extent in his object. I do not say he was entirely unjustified, but it is clear to me that his conduct was such, whether incautious or otherwise, as to have given rise to the rumours. The judge who tried the action came to the conclusion that there had been a great deal in the conduct of the plaintiff that really caused the whole matter, and in these circumstances thought himself justified in depriving him of his costs. I think he was right in so doing. It was argued that the sum of 10*l.* was conclusive that there had been no misconduct or incautiousness on the part of the plaintiff. I cannot but think that the sum of 10*l.* was not awarded as the measure of any damage due to the letter, or as the measure of injury to the wounded feelings of the plaintiff, but was obtained through the eloquence and skill of his counsel, who managed to impress upon the jury that a less sum would not be sufficient to send the plaintiff home with his character cleared. In fact it was given as a response to the appeal to their feelings, and not as the actual measure of the damage done to the plaintiff by the defendant's letter. I think the judge was justified in holding that the 10*l.* given as damages was not substantially different from 20*s.* It appears to me that it would be doing injustice to the defendants if we were to make them pay costs on account of this incautious letter. The appeal must be dismissed with costs.

BRETT and COTTON, L.JJ., concurred.

Appeal dismissed.

Solicitors for plaintiff: *Digby & Tabor.*
Solicitor for defendants: *T. S. George.*

[IN THE COURT OF APPEAL.]

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May 12.

HILLS *v.* RENNY AND OTHERS.

County Court—Interpleader Summons—County Courts Act, 1867 (30 & 31 *Vict.* c. 142), s. 31—*Officers of the County Court—Stay of Action after Sale of Goods.*

Where goods are seized under an execution issued on a judgment in a County Court and sold, and an interpleader summons is taken out at the instance of the High Bailiff, under the County Courts Act, 1867, s. 31, the County Court judge has power to adjudicate upon the damages, to which the claimant of the goods may be entitled, arising out of the execution, although the goods have been sold, and therefore are no longer in the control of the County Court; and any action against the officers of the Court for wrongfully depriving the plaintiff of his goods will be stayed; but an action against the purchasers of the goods from the officers of the County Court will not be stayed.

14 BD 431

THIS was an appeal from a refusal of a master to stay proceedings in the action. The matter came by way of appeal before a judge and was referred to the Court.

The action was brought against six defendants, three of whom were officers of a county court, to recover damages for wrongfully depriving the plaintiff of his goods, which had been seized under an execution on a judgment of the county court against one Hills, a brother of the plaintiff. An application was made at chambers to stay the proceedings against the three county court officers, on the ground that an interpleader summons had been issued, under the County Courts Act, 1867, s. 31.

1879. Dec. 1. *Bigham*, for the applicants, contended that the order should be made. That the Act was intended to protect the officers of the Court, and covered the present case. He cited *Jessop* v. *Crawley* (1), *Tinkler* v. *Hilder* (2), *Winter* v. *Bartholomew*. (3)

Cock, contrà, contended that the plaintiff was not making a "claim to or in respect of any goods or chattels taken in execution under the process of a county court, or in respect of the proceeds or value thereof" within the section, since the goods had been sold before the claim was made, and the jurisdiction

(1) 15 Q. B. 212. (2) 4 Ex. 187.
(3) 11 Ex. 704; 25 L. J. (Ex.) 62.

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of the county court only arose when the goods came into the possession of the officers of the Court, and terminated when they ceased to have control over them. He cited *Abbott* v. *Richards* (1), and *Death* v. *Harrison*. (2)

1880. April 8. The judgment of the Court (Kelly, C.B., and Stephen, J.) was read by

STEPHEN, J. This case was referred by Mr. Justice Stephen, for the opinion of the Divisional Court, having come before him at chambers, on appeal from the decision of a master, who refused to make an order to stay proceedings under the following circumstances.

The action was brought by the plaintiff, John Frank Hills, against Renny, Whiteman, Chalcroft, Kinsole & Son, Lock and Silverton. The claim endorsed on the writ is for wrongfully depriving the plaintiff of goods, and the relief claimed is the return of the goods, and damages for their detention.

Three of the six defendants were officers of the county court at Portsmouth, Renny being the high bailiff, and the other three were purchasers from them. The motion now before us is made on behalf of the county court officers only.

Two persons named May and Cripps, sued Hills the brother of the plaintiff, in the Portsmouth County Court, and recovered judgment against him in each action.

On the 23rd of July, 1879, a warrant for execution was put into the defendant Whiteman's hands, and he levied on the goods in question. On the 29th of July, the goods were sold for 19*l.* 15*s.*

On the 30th of July, the day after the sale, Hills, the plaintiff, sent in a claim to the goods.

On the 12th of August, the writ in this action was issued by Hills the plaintiff.

On the 15th of August an interpleader summons was taken out in the county court under 30 & 31 Vict. c. 142, s. 31, and on the 19th of August a summons to stay proceedings in this action was taken out before a Master of the High Court, who, on the hearing, made no order. His decision was appealed from to Mr. Justice Stephen at chambers, and he referred the matter to the Divisional

(1) 15 M. & W. 194. (2) Law Rep. 6 Ex. 15.

Court. The county court interpleader summons stands over till the decision by this Court of the summons to stay proceedings.

The words of s. 31 of the County Courts Amendment Act of 1867 are, "If any claim shall be made to or in respect of any goods or chattels taken in execution under the process of a county court, or in respect of the proceeds or value thereof, it shall be lawful for the registrar of the court, upon application of the high bailiff, as well before as after any action brought against him, to issue a summons calling before the said Court as well the party issuing such process as the party making such claim, and the judge of the Court shall adjudicate upon such claim and make such order between the parties in respect thereof and of the costs of the proceedings as to him shall seem fit, and shall also adjudicate between such parties or either of them and the high bailiff, with respect to any damage or claim of or to damages arising or capable of arising out of the execution of such process by the high bailiff and make such order in respect thereof and of the costs of the proceedings as to him shall seem fit:" after making provision for the enforcement of the order and providing that it shall be conclusive between all the parties, the section ends by enacting as follows: "And upon the issue of the summons any action which shall have been brought in any court in respect of such claim, or of any damage arising out of the execution of such process, shall be stayed." It follows that the proceedings in the present action ought to be stayed, if it is brought in respect of any goods taken in execution under the process of any county court, or in respect of the proceeds or value thereof, or in respect of any damage arising out of the execution of the process of a county court.

It was contended on the part of the plaintiff that the action was not a claim to or in respect of goods taken under the process of a county court, because the goods had been sold before the claim was made, and so had ceased to be taken in execution at the time when the action was brought. It was also said that it was not brought in respect of the proceeds or value of the goods, but for their return and for damages for their detention. An attempt was also made to shew that the claim was not for any damage arising out of the execution of the process of the Court.

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Independently of all authority, it appears to us that the case falls within the words of the section, and also within its obvious intention, which was that the county court judge should decide just such questions as those which arise in this case. Apart, however, from this, we think that the counsel for the plaintiff entirely failed to distinguish this case from the case of *Death* v. *Harrison* (1) and from the earlier case of *Tinkler* v. *Hilder* (2), in which (though it was decided on another ground), the majority of the Court of Exchequer expressed an opinion in favour of the view which we take. There must therefore be an order to stay proceedings as against the county court officers.

Order to stay.

The plaintiff appealed.

When the case came first before the Court of Appeal it was adjourned in order to give the defendants, who had purchased the goods in question from the defendant Renny, an opportunity of appearing.

1880. May 12. *Bigham*, for the county court officers. The action ought to be stayed against all parties; each party is separately liable for the tort, and it is proper that the rights of the parties should be equitably adjusted by the judge of the county court. There cannot be a valid claim against a bailiff in respect of goods which he has sold.

English Harrison, for the purchasers. 30 & 31 Vict. c. 142, s. 31, is a substitute for 9 & 10 Vict. c. 95, s. 118; but the two enactments are not identical: the language is different, and the present enactment is more comprehensive in its terms; it includes claims for damages arising out of the execution of any process. The whole object of the later section is to increase the power of the Court. It is only equitable that the purchasers should have summary relief, for they have no right to an indemnity from the high bailiff.

Cock, for the plaintiff. 30 & 31 Vict. c. 142, s. 31, was intended to meet one of two cases, either when the goods are still

(1) Law Rep. 6 Ex. 15. (2) 4 Ex. 187.

in the custody of the bailiff, or when the claimant seeks to recover the proceeds of the sale; it does not apply to a case where the owner desires to follow the goods. The words "taken in execution" must mean "whilst held in execution."

BRETT, L.J. We were in hopes to be able to give a wide interpretation, so that all the persons interested should go before the judge of the county court, and that their respective rights should be determined by him; but I do not see my way to this conclusion.

It seems to me that the present case falls within 30 & 31 Vict. c. 142, s. 31. "Taken in execution" does not mean "whilst held in execution:" that would be a violent construction: "taken in execution" may be read as "having been taken," or "which have been taken:" this is not an unfrequent idiom. It is provided that, upon the application of the high bailiff, a summons shall be issued to call before the judge the party issuing the process and the claimant. The judge therefore has power to decide between the execution creditor and the claimant and the bailiff; but these are the only parties over whom he has jurisdiction. In the last clause of the section, power is given to stay actions arising in respect of claims to the goods taken in execution. No doubt the words are very large, and it is argued that they embrace the case of actions brought against other parties, and that if an order to stay is made, no action can be maintained against them. I think that this argument leads to a result which cannot be maintained. The power to stay must be confined to those parties, who appear before the judge of the county court. The present action is brought by the claimant against the bailiff and his officers, and also against the purchasers of the goods seized, who are unfortunate if they purchased innocently. As the facts fall within 30 & 31 Vict. c. 142, s. 31, the action ought to be stayed as to the high bailiff and his officers; but there is no authority to stay it as against the purchasers. The judgment of the Exchequer Division was right, and as the action could not have been stayed in favour of the purchasers, it must proceed as against them. I do not express my opinion as to what the result will be. The dispute between the claimant, the high bailiff, and the execution creditor must go

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back to be decided before the judge of the county court. We shall give no costs in this court against the purchasers.

COTTON, L.J. The question is whether this action can be stayed. The order to stay purports to be made under 30 & 31 Vict. c. 142, s. 31. The words "taken in execution," cannot be construed as "still held under execution." It is said that the section has no application to the present case, because there is only power to bring before the judge of the county court, at the instance of the bailiff, the claimant and the execution creditor. The first point to be considered is whether the purchasers can be summoned; the statute gives power to summon the party claiming the goods, and the party at whose instance the execution has been issued. These words do not primâ facie include a purchaser of the goods; but it is argued that he is a person making a claim to them; but I think that the word "claim" refers to a claim adverse to the execution, not to a claim under it. There is therefore no power to bring before the county court any purchaser from the high bailiff; there is no power to give any damages against him, which might be a substitute for a right of action at common law. As there is no power to bring a purchaser before the Court, there is no power to stay proceedings against him. I think that the last clause of the section does not extend to purchasers.

THESIGER, L.J. The enactment, which we have to construe, is not clear and is not satisfactory: it is unfortunate that the rights of all parties cannot be adjusted in one proceeding. It seems to me that the Exchequer Division was right. The counsel for the plaintiff has contended that 30 & 31 Vict. c. 142, s. 31 does not apply, because damages for the wrongful seizure of goods are claimed and are in truth the gist of the action: this contention, however, cannot be supported, for the section extends to "claims in respect of any goods;" the plaintiff is the claimant of either the true value of the goods or the sum which they actually fetched. There is therefore jurisdiction to summon the execution creditor and the claimant before the judge of the county court but no jurisdiction to summon a purchaser of the goods.

The remaining question is whether, as there is no jurisdiction to summon the purchasers before the county court judge, the

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action can be stayed as to them. I think not. The words of the last clause are not clear; but the reasonable interpretation is that they must be limited by what has gone before. Any action against any of the parties, who may be brought before the judge of the county court, is to be stayed: but the position of a purchaser from the high bailiff must be determined in the action in which he is sued.

Appeal dismissed.

Solicitors for plaintiff: *Pattison, Wigg, & Co.*

Solicitors for county court officers: *Gregory, Rowcliffes, & Rawle.*

Solicitors for purchasers: *Sole, Turner, & Knight, for G. H. King, Portsea.*

[IN THE COURT OF APPEAL.]

Aug. 5.

THE METROPOLITAN BANK *v.* HEIRON.

Statute of Limitations—Breach of Duty by Person in a Fiduciary Position—Bribe to Director—Concealed Fraud.

An action was brought by a company in 1879 against a former director to recover 250*l.*, on the ground that the defendant had received it from a debtor to the company as a bribe, to induce him to use his influence to obtain favourable terms of compromise for the debtor. The allegations that this bribe had been given had in 1872 been brought before the directors at a board meeting, they had investigated it, and as it seemed came to the conclusion that the charge was unfounded, as no proceedings were taken, and it was not alleged that the other directors had been acting otherwise than bonâ fide in the matter.

Held, affirming the decision of Stephen, J., that the claim of the company was barred by the Statute of Limitations.

Although where a trustee receives money upon an express trust and wastes it, the Statute of Limitations does not run against the claim of the cestui que trust, yet where a trustee receives money not belonging to the cestui que trust, but which the cestui que trust can claim on the ground that the receipt of it was a fraud upon him, the Statute of Limitations will run against the claim of the cestui que trust from the time when he discovers the fraud.

THIS was an appeal from a decision of Stephen, J.

The action was by The Metropolitan Bank, which was in course of voluntary liquidation, and the liquidator, against Heiron who had been a director.

The 4th paragraph of the statement of claim alleged that in

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1872 the defendant by false and fraudulent statements as to the pecuniary position of one F. Daniells, induced the bank to accept from Daniells the sum of 50*l.* in satisfaction of a claim which they had against Daniells for 3800*l.* The 5th paragraph was as follows:—

"While the said F. Daniells was still liable to the bank in the sum of 3800*l.*, the defendant was a director of the said bank and attended meetings of the directors, and as such took an active part in the management and conduct of the business of the bank, and performed the various duties, and acted otherwise in the capacity, of a director, and stood in a fiduciary relation towards the bank. The said F. Daniells having represented to the bank that he was unable to pay to the bank the whole of the sum of 3800*l.*, requested the defendant to endeavour to procure a settlement of the said claim of the bank and to use his influence and position as a director for that purpose, which the defendant agreed to do, and while the defendant was acting as a director as aforesaid, handed to the defendant, and the defendant received from him, the sum of 250*l.*, for the purpose of so settling the said claim. The defendant did not pay or hand over to the bank the said sum of 250*l.* nor any part thereof, but wrongfully, and in breach of his trust and fiduciary relation to the bank, retained the said sum for his own use, and by misrepresentations to the bank induced the bank to agree to accept, and the bank did accept, the sum of 50*l.* from the said F. Daniells in discharge of the said claim of the bank against him."

The plaintiffs claimed from the defendant (inter alia) "the sum of 250*l.* in respect of the matters in the 5th paragraph mentioned."

The defendant by his defence denied having received anything from Daniells. In paragraph 7 he pleaded the Statute of Limitations to all the demands of the bank, and as to the claim for 250*l.* he, by paragraph 8, alleged that assuming the bank ever to have had a claim against the defendant in respect of it, they had disentitled themselves to recover it by slackness and delay, and by omitting to take proceedings for a long time after the alleged facts on which their claim was founded came to their knowledge, or for a long time after they might by due diligence have discovered the facts.

The plaintiffs by their reply alleged as to paragraph 7 of the defence, that the causes of action mentioned in the 5th paragraph of the statement of claim arose wholly in respect of a breach of trust and breach of duty by the defendant in his fiduciary relation to the bank.

The resolution to release Daniells on payment of 50*l.* was passed by the directors on the 26th of March, 1872. On that same day the solicitors of Daniells wrote to Heiron a letter which was in fact as follows:—

"We have been consulted by Mr. F. Daniells with reference to the circumstances under which you obtained from him the sum of 100*l.* cash and bills of exchange for 150*l.* in addition, under the pretence that you as a director of the Metropolitan Bank, Limited, could and would exercise such influence as would induce that bank to discharge him from his liability the payment of which you guaranteed. . . . We require payment of the 100*l.* and the return of the bills during to-morrow, and if this demand be not complied with we shall take further action without any notice to you." This letter was communicated by Heiron to the solicitors of the bank, and was discussed at board meetings of the directors in or about May, 1872, and communications passed between Daniells and the board on the subject. No steps, however, were taken to enforce against Heiron any claim in respect of the matters mentioned in the 3rd and 4th paragraphs of the statement of claim till the commencement of the present action on the 25th of June, 1879. There was no allegation either on the pleadings or in evidence that the directors believed the allegations made by Daniells to be true and were acting in collusion with Heiron.

Stephen, J., held that the Statute of Limitations was a bar to all the claims of the plaintiffs. The plaintiffs appealed.

Phillimore, for the appellants. This is an equitable action on the ground of breach of trust, and the Statute of Limitations is no bar: *Brittlebank* v. *Goodwin* (1); *Obee* v. *Bishop* (2); *Stone* v. *Stone*. (3)

(1) Law Rep. 5 Eq. 545. (2) 1 D. F. & J. 137. 6 Jur. N.S. 132

(3) Law Rep. 5 Ch. 74.

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[COTTON, L.J. In those cases a person had money in his hands upon an express trust. Have you any case as to the applicability of the Statute of Limitations where a director has received money which never was the money of the company, and to which the company has no claim, except on the ground that the director received it as a bribe for committing a breach of trust?]

The principles laid down by Lord Hardwicke in *Charitable Corporation* v. *Sutton* (1) apply to such a case, and there the remedy was given after more than six years.

[COTTON, L.J. In that case the funds of the company were lost by the misconduct of the directors. The question is whether the same rule applies to a sum which has never actually become part of the funds of the company.]

The Court is not bound by the Statute of Limitations in such a case, because the statute only applies to legal demands, and Courts of Equity, as is shewn by the cases referred to, do not follow the analogy of the statute in cases relating to breaches of duty. *Hovenden* v. *Lord Annesley* (2) was relied upon by the defendant in the Court below, but that was a case where the demand was of a legal nature, and was only brought in equity because there was an outstanding legal estate which prevented the action being brought at law, and it is only to such cases that the Statute of Limitations will be applied by analogy. A director is a quasi-trustee: Lindley's Partnership, pp. 597, 613, and the same rule applies to him as to a trustee.

Gore, contrà. This is an action for money had and received, and the money was recoverable at Common Law: *Morison* v. *Thompson* (3), which was a case like this of a bribe.

[BRETT, L.J. That is quite a different case. The substance of it was that the agent bought the ship for one price, told the principal that he had bought it for more, and pocketed the difference. In that case if the agent had been honest he would have paid the money to the principal; in the present case, if he had been honest he would never have received it at all.

JAMES, L.J. In that case the agent divided the purchase-money

(1) 2 Atk. 400.
(2) 2 Sch. & Lef. 607, 630.
(3) Law Rep. 9 Q. B. 480.

between the vendor and himself. I cannot see how a bribe paid to an agent can be considered money had and received for the use of the principal.

BRETT, L.J. It appears to me that an action at law might lie in this case for the misrepresentations made by the defendant, if they were fraudulently made, and that the loss which the bank suffered through them would be the measure of damages; but I do not understand how this 250*l.* could be recovered at law on the ground that the defendant received it as a bribe.]

Assuming, then, that there is no demand at law, the equitable remedy on the ground of fraud is barred by the Statute of Limitations, for the statute begins to run from the time when the fraud is discovered: *South Sea Company* v. *Wymondsell.* (1) Here the whole matter was discussed at board meetings of the directors more than six years before this action was commenced. [He was here stopped by the Court.]

Phillimore, in reply.

JAMES, L.J. The ground of this suit is concealed fraud. If a man receives money by way of a bribe for misconduct against a company or cestui que trust, or any person or body towards whom he stands in a fiduciary position, he is liable to have that money taken from him by his principal or cestui que trust. But it must be borne in mind that that liability is a debt only differing from ordinary debts in the fact that it is merely equitable, and in dealing with equitable debts of such a nature Courts of Equity have always followed by analogy the provisions of the Statute of Limitations, in cases in which there is the same reason for making the length of time a bar as in the case of ordinary legal demands. In the case of a bribe received, or other profit made by a person in a fiduciary position, there is no doubt that the cestui que trust who is wronged is not barred by any length of time, so long as that wrong is concealed from him by the wrongdoer. But when the cestui que trust knows of the fact, or knows that the fact is charged, and investigates the case, it is for him to make up his mind whether he will bring proceedings, just as any other creditor has to make up his mind whether he will issue a writ or not, and

(1) 3 P. Wms. 143.

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if he allows six years to elapse after he has had full information and knowledge of the alleged wrong before he takes steps to enforce the redress for that wrong, then the person against whom he brings such a suit has, according to my view, a clear right to avail himself of the lapse of time against the claim as much as if it had been a mere legal demand. I think, therefore, that the Statute of Limitations in this case began to run from the time at which the company discovered the fact, and the company must be held to have discovered the fact at the time when the person who is said to have paid the bribe went to the board of directors and told them the circumstances of the case. The fact that the directors investigated it and came to the conclusion that it was not true, does not at all help the company, unless they allege and prove that the directors became accomplices in the fraud and added to the original fraud by a gross neglect of duty on their part. There is no suggestion of that kind, and if there were it ought to have been proved that they neglected their duty in not communicating the fact to the company of which they were directors.

BRETT, L.J. It seems to me that the only action which could be maintained by the company or by the liquidator of the company against this defendant would be an action in equity founded upon the alleged fraud of the defendant. Neither at law nor in equity could this sum of 250*l.* be treated as the money of the company, until the Court, in an action by the company, had decreed it to belong to them on the ground that it had been received fraudulently as against them by the defendant. In such a case, as I understand the ruling of Lord Redesdale, the money is to be considered as held adversely to the plaintiffs, the company, until the decree; and where the suit is founded upon fraud so that there is no trust until the decree, although the Statute of Limitations does not strictly apply to equitable demands, yet Courts of Equity will follow the analogy of the statute and apply it to such a case.

Then the only remaining question is, from what time does the statute run, and it seems to have been held that it runs from the time when the fraud is first made known to the plaintiff. If in

the present case, notice of the alleged fraud had only been given to the other directors individually, it seems to me that this would not have been notice to the company, and that the statute would not have begun to run; but here the fraud, if fraud in fact there was, was made known to a board of directors acting as such at a properly constituted board meeting, which is the only way in which a company can receive notice. Therefore the fraud, if any, was made known to the company, and was so made known more than six years before the action was instituted. The claim therefore is barred.

COTTON, L.J. In this case Mr. Justice Stephen was, in my opinion, right in holding that the claim was barred by the Statute of Limitations. In favour of the appeal it was urged that no time runs against a breach of trust; but that argument was founded on an insufficient definition of what is meant by a breach of trust. Where a trustee has a fund in his possession and wastes it either by neglect of duty, or by doing an act not justified, and the cestui que trust comes to recover his money, no time will bar his suit, for it is a claim by the cestui que trust against the trustee for money or property which was in the possession of the trustee, and must be considered as in the possession of the trustee for the benefit of the cestui que trust until the trustee duly discharges himself. To such a suit there is no bar by statute.

But the present is not such a case. Here the money sought to be recovered was in no sense the money of the company, unless it was made so by a decree founded on the act by which the trustee got the money into his hands. It is a suit founded on breach of duty or fraud by a person who was in the position of trustee, his position making the receipt of the money a breach of duty or fraud. It is very different from the case of a cestui que trust seeking to recover money which was his own before any act wrongfully done by the trustee. The whole title depends on its being established by a decree of a competent Court that the fraud of the trustee has given the cestui que trust a right to the money, and although no time will run in such a case till the cestui que trust knows of the fraud, yet a Court of Equity, whether by analogy or in obedience to the statute, will hold such a claim

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barred if the cestui que trust stands by and takes no proceedings for six years from the time when he became aware of the fraud.

The only question, therefore, in this case, is whether the company is to be held to have known of the fraud more than six years before the commencement of the action. The mere statement that the alleged fraud was known to the directors left this doubtful, but it appears that it was made known in the only way in which the company can know anything, by a communication made to the directors at a regular board meeting, and there is no suggestion that they, for any purpose of their own or in fraud of the company, abstained from investigating it. They seem to have investigated it and to have been of opinion that the charge was not well founded. They in 1872 knew of the charge and of the circumstances which would have justified the company in bringing the claim. From that time the statute began to run, and in my opinion Mr. Justice Stephen was right in saying that it was a bar to this action.

Appeal dismissed.

Solicitors for plaintiffs: *Newman, Stretton, & Hilliard.*
Solicitors for defendant: *Harper, Broad, & Battcock.*

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2. —— *Interpleader Summons—County Courts Act*, 1867 (30 & 31 *Vict. c.* 142), *s.* 31—*Officers of the County Court—Stay of Action after Sale of Goods*,] Where goods are seized under an execution issued on a judgment in a County Court and sold, and an interpleader summons is taken out at the instance of the High Bailiff, under the County Courts Act, 1867, s. 31, the County Court judge has power to adjudicate upon the damages, to which the claimant of the goods may be entitled, arising out of the execution, although the goods have been sold, and therefore are no longer in the control of the County Court; and any action against the officers of the Court for wrongfully depriving the plaintiff of his goods will be stayed; but an action against the purchasers of the goods from the officers of the County Court will not be stayed. HILLS *v.* RENNY **C. A. 313**

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DAMAGES, MEASURE OF—*Agreement to sell Property in Consideration of Payment of Debts—Insolvency of Vendors—Action by Trustee for Breach of Contract—Nominal Damages.*] A. & S., being traders in embarrassed circumstances, sold their business to the defendant upon condition that he should pay certain debts owing by them. This he failed to do, and left a balance of 1750*l.* unpaid to the creditors of A. & S. A. & S. afterwards liquidated their affairs by arrangement under the Bankruptcy Act, 1869, and the plaintiff having been appointed trustee, brought an action for breach of contract:—*Held*, that he was entitled to recover the sum of 1750*l.*, and not merely nominal damages.—*Porter* v. *Vorley* (9 Bing. 93) disapproved of. ASHDOWN *v.* INGAMELLS **C. A. 280**

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FRAUDULENT CONVEYANCE—13 *Eliz. c.* 5—*Delaying Creditors.*] Debtors in insolvent circumstances executed a deed by which they conveyed all their estate to trustees on trust to sell in such manner as they might think proper, and to divide the residue of the proceeds after paying expenses rateably among the creditors parties to the deed, and, if the trustees thought fit, creditors who refused or neglected to execute, and, if the trustees thought proper but not otherwise, to pay the dividends on debts due to non-assenting creditors to the debtors. The deed provided for the payment of maintenance to the debtors if the trustees thought fit, and the executing creditors respectively indemnified the debtors and the trustees in respect of the bills of exchange and promissory notes made or indorsed to them respectively by the debtors in respect of the scheduled debts:—*Held*, that the deed was not void under 13 Eliz. c. 5.—*Spencer* v. *Slater* (4 Q. B. D. 13) distinguished. Boldero *v.* London and Westminster Loan and Discount Company 47

FREIGHT—Payable on quantity of goods delivered—Loss of part of cargo - 130 *See* Ship. 2.

HIGHWAY — Ownership of land adjoining — Limitations, Statute of - - 264 *See* Vendor and Purchaser.

INCLOSURE—Award - - - 254 *See* Way, Right of.

INCOME TAX—Balance of profits and gains—Deduction for exhausted capital 241 *See* Revenue.

—— Foreign corporation - - - 57 *See* Revenue. 2.

—— Slate quarry - - - - 93 *See* Revenue. 4.

INTERPLEADER—County court—Stay of action *See* County Court. 2. [313

LANDLORD AND TENANT—Disclaimer of lease—Bankruptcy—Liability for use and occupation - - - - 170 *See* Bankruptcy.

LIBEL—Privileged communication—Proceedings before court of justice - - 53 *See* Defamation.

LIEN—Shipowner—Nominal freight - 130 *See* Ship.

LIMITATIONS, STATUTE OF—*Breach of Duty by Person in a Fiduciary Position—Bribe to Director—Concealed Fraud.*] An action was brought by a company in 1879 against a former director to recover 250*l.*, on the ground that the defendant had received it from a debtor to the company as a bribe, to induce him to use his influence to obtain favourable terms of compromise for the debtor. The allegations that this bribe had been given had in 1872 been brought before the directors at a board meeting, they had investigated it, and as it seemed came to the conclusion that the charge was unfounded, as no proceedings were taken, and it was not alleged that the other directors had been acting otherwise than bonâ fide in the matter.—*Held*, affirming the decision of Stephen, J., that the claim of the company was barred by the Statute of Limitations.—Although where a trustee receives money upon an express trust and wastes it, the Statute of Limitations does not run against the claim of the cestui que trust, yet where a trustee receives money not belonging to the cestui que trust, but which the cestui que trust can claim on the ground that the receipt of it was a fraud upon him, the Statute of Limitations will run against the claim of the cestui que trust from the time when he discovers the fraud. Metropolitan Bank *v.* Heiron - C. A. 319

—— Ownership of soil of intended highway 264 *See* Vendor and Purchaser.

LOCAL GOVERNMENT ACTS—*Acting as Member after Disqualification—Action for Penalty—Party aggrieved—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 253, *sch.* 2, *rule* 70.] By the Public Health Act, 1875, s. 253, proceedings for the recovery of a penalty under that Act shall not, "except as in this Act is expressly provided," be taken by any person other than a party aggrieved, or a local authority, without the consent of the Attorney General: and by Rule 70 of Schedule II. (which by s. 317 is to be read as part of the Act) a penalty is imposed upon any person acting as a member of a local board without qualification, such penalty being by the same rule made recoverable by any person:—*Held*, affirming the judgment of the Exchequer Division, that the provision of rule 70 that the penalty might be recovered by any person was an "express provision" of the Act, within the meaning of s. 253, and that consequently in actions for penalties under that rule the consent of the Attorney General was not necessary. Fletcher *v.* Hudson - C. A. 287

2. —— *Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 179, 180, 257—*Local Board—Expense of paving Street—Award—Liability of Frontager not a Party to Arbitration.*] An award in an arbitration under the Public Health Act, 1875, between one of several frontagers called upon to pay the expense of paving a street and an urban authority, by which the arbitrator has altered not merely the assessment upon the particular frontager, but the assessment in regard to all the frontagers, is not binding upon any frontager not

LOCAL GOVERNMENT ACTS—*continued.*
a party to the arbitration, so as to entitle the urban authority to recover from him the sum which would be due from him on the footing of the altered assessment. Tunbridge Wells Local Board *v.* Akroyd - - - C. A. 199

LUNATIC—Pauper—Adjudication of settlement *See* Poor Law. [215

NEGLIGENCE—*Owner of Land receiving Payment for use of Land.*] The defendants were the owners of a cattle-market, and in the market-place they had erected a statue, round which they had placed a railing as a fence. The plaintiffs attended the market with their cattle, and occupied a particular site, for which they paid a toll. A cow belonging to them, in attempting to jump the railing, injured herself, and subsequently died from the injuries. The jury found that the railing was dangerous:—*Held*, that the defendants having received toll from the plaintiffs, and invited them to come to the market with their cattle, a duty was imposed on them to keep the market in a safe condition, and therefore an action would lie against the defendants for the loss sustained by the plaintiffs. Lax *v.* Corporation of Darlington - - - - C. A. 28

NEW TRIAL—Action commenced in Chancery Division - - - - 275
See Practice. 2.

PASSENGER DUTY—Railway - - 247
See Revenue. 3.

PAWNBROKER — Delivery of pledge to person producing pawn ticket - - 37
See Pledge of Goods.

PENALTY—Action for—Party aggrieved - 287
See Local Government Acts.

PLEDGE OF GOODS — *Pawnbrokers Act*, 1872, 35 & 36 *Vict. c.* 93, *s.* 25—*Rights of Owner of Goods pledged against his Will.*] The indemnity given by section 25 of the Pawnbrokers Act, 1872, to a pawnbroker who delivers a pledge to the person producing the pawn-ticket applies only as between the pawnbroker and the pawner or the owner who has authorized the pledge, and the Act does not affect the common law rights of the owner of property which is pledged against his will. Singer Manufacturing Company *v.* Clark [37

POOR LAW—*Pauper Lunatic—Lunatic Asylums Act*, 1853 (16 & 17 *Vict. c.* 97), *s.* 80—*Adjudication of Settlement—Liability of Parish to remove from Asylum.*] When the visitors of an asylum have ordered a pauper lunatic confined therein to be discharged therefrom under s. 80 of the Lunatic Asylums Act, 1853 (16 & 17 Vict. c. 97), the overseers of the parish from which the lunatic was sent to the asylum are bound under that section to remove him to their parish, although it has been adjudged that the lunatic was not settled in that parish and that it could not be ascertained in what parish he was settled. Overseers of Liverpool *v.* Lancaster Lunatic Asylum - 215

POOR RATE—*Outgoing Occupier—Liability when no incoming Occupier—Poor Rate Assessment Act*, 1859 (32 & 33 *Vict. c.* 41), *s.* 16.] The statute

POOR RATE—*continued.*
32 & 33 Vict. c. 41, s. 16, does not relieve an occupier, who is assessed in a poor rate but ceases to occupy before the rate has been wholly discharged, from his liability to pay the whole rate, unless there is some tenant who succeeds to the occupation of the hereditament, so as to become liable to pay a proportionate part of the rate. Overseers of Werburgh *v.* Hutchinson - 19

PRACTICE—*Appeal—Trial by Judge without a Jury—Motion for New Trial.*] Where an action has been tried by a judge without a jury, if the unsuccessful party is dissatisfied with the judgment either on the ground that the judge has misdirected himself as to the law, or that his findings as to the facts are against the weight of evidence, the proper mode of obtaining relief is by appeal to the Court of Appeal, and not by motion for a new trial.—*Krehl* v. *Burrell* (10 Ch. D. 420) commented on. Potter *v.* Cotton - C. A. 137

2. —— *Application for New Trial—Action commenced in Chancery Division — Divisional Court—Rules of Court, Orders V., rule* 4 (*a*); *XXXIX., rule* 1—*New Trial of Issues.*] When an action, commenced in the Chancery Division, has been tried by a jury before one of the judges of a Common Law Division it is thenceforth transferred to the division to which the judge belongs, and an application for a new trial must therefore be made to a divisional Court of that division.—But this does not apply to an action in which an issue has been directed by a judge of the Chancery Division. The action in that case still remains attached to the Chancery Division. Jones *v.* Baxter [C. A. 275

3. —— *Costs—Discretion of Judge—Trial by Jury—Rules of Court*, 1875, *Order LV.*—"*Good Cause.*"] In exercising his discretion to deprive a successful party of his costs under Order LV., the judge is not confined to the consideration of the conduct of the party in the course of the litigation, but may consider his conduct previous to and conducing to the action. He must, however, assume the truth of the facts found by the jury. Harnett *v.* Vise - - - C. A. 307

4. —— *Costs — Event — Several Causes of Action—Rule* 62 *of Rules of Hilary Term*, 1853 *—Judicature Act*, 1875, *s.* 33—*Order LV., rule* 1.] When in the same action the plaintiff obtains a verdict and judgment as to one cause of action, and the defendant obtains a verdict and judgment as to other and distinct causes of action, the word "event" in Order LV., rule 1, is to be read distributively, and the defendant is entitled to tax his costs of the issues found for him, provided no order otherwise is made by the judge who tried the cause or the Court.—Rule 62 of Rules of Hilary Term, 1853, is repealed by s. 33 of the Judicature Act, 1875. Myers *v.* Defries - 15

5. —— *Costs*—"*Event*"—*Several Causes of Action — Rules of Hilary Term*, 1853, *No.* 62—*Rules of the Supreme Court*, 1875, *Order LV., rule* 1.] When in the same action the jury find for the plaintiff with damages as to one cause of action and for the defendant as to other and distinct causes of action, the word "event" in the proviso to Rules of the Supreme Court, 1875, Order LV., rule 1, must be read distributively

PRACTICE—*continued.*

and the defendant is entitled to tax his costs of the issues found for him, provided no order otherwise is made by the judge who tried the cause or by the Court.—Judgment of the Exchequer Division (5 Ex. D. 15) affirmed. Myers *v.* Defries [C. A. 180

6. —— *Evidence by Affidavit or Orally—Rules of Equity Exchequer, 14th March,* 1866, X. 2, 3.] An information was filed on the Equity side of the Exchequer Division to recover passenger duty from a railway company, the question in dispute being whether certain trains run by the company were cheap trains, within the meaning of the Act exempting from passenger duty the fares for the conveyance of passengers at fares not exceeding one penny per mile by cheap trains. The company applied to have the evidence taken orally:—*Held,* reversing the decision of the Exchequer Division, that the evidence ought to be taken orally, as it was desirable that in such a case the Court should be able to obtain immediate information and explanations by putting questions to the witnesses. Attorney General *v.* Metropolitan District Railway Company - - - C. A. 218

7. —— *Production of Documents—Privileged Communications — Tendency to criminate.*] A party cannot protect himself from producing a document on the ground that its production would tend to criminate him unless he pledges his oath that, to the best of his belief, its production would tend to criminate him.—Whether a party can protect himself from producing a document on the ground that its production would tend to criminate him, *quære.*—A letter written in answer to inquiries about the character of a servant is privileged in this sense only, that although it contains defamatory statements it will not support an action for libel unless malice is shewn; but it is not privileged in the sense of being privileged from production, such privilege being confined to communications with the legal advisers of the party. Webb *v.* East - - C. A. 108

8. —— *Production and Inspection of Documents — Tendency to criminate — Objection on Oath.*]—A party to an action who objects to the production of a document for inspection, on the ground that it may tend to criminate him, must make the objection on oath. Webb *v.* East 23

9. —— *Notice of Trial—Entry of Cause—Close of Pleadings—Order XXXVI., rules* 3, 17 *a.*] A cause cannot be entered for trial under Order XXXVI. before the pleadings are closed. Metropolitan Inner Circle Railway Company *v.* Metropolitan Railway Company - - 196

10. —— *Action on Replevin Bond—Judgment for want of Statement of Defence—Order XXIX., rules* 2, 4.] If, in an action on a replevin bond, the plaintiff, instead of claiming damages, claims the amount for which the bond is given, and becomes entitled to judgment by default, his proper course is to enter final judgment under Order XXIX., rule 2, and not interlocutory judgment under rule 4 of that order. Dix *v.* Groom 91

11. —— *Writ specially indorsed—Rules of Supreme Court,* 1875, *Order XIV. rules* 1, 3—*Leave to defend upon bringing the Sum claimed into Court.*] Where a summons has been issued

PRACTICE—*continued.*

under Order XIV., the defendant, if he makes no affidavit of merits, is not entitled as matter of right to defend the action upon offering to bring the sum claimed into court. A discretion is vested in the judge to decide whether, upon considering the other facts of the case, the defendant's offer is a sufficient ground for refusing the plaintiff's application. Crump *v.* Cavendish - C. A. 211

—— Appeal, Supreme Court — Trial by judge without jury — Motion for new trial—Appeal - - - - 115
See Ship.

PREDECESSOR—Succession duty - - 139

PRIVILEGED COMMUNICATION—Report of proceedings in court of justice - 53
See Defamation.

PROHIBITION—Jurisdiction of railway commissioners to alter tolls fixed by statute 1
See Railway. 2.

RAILWAY — *Accommodation Works — Damage arising from Insufficiency—Right of Action excluded by Statutory Remedy—Railways Clauses Consolidation Act,* 1845 (8 *Vict. c.* 20), *ss.* 68–73.] A railway company constructed a culvert to carry off water from land adjacent to the railway. No complaint was made by the owner of the land of the insufficiency of the culvert, and no application was made to justices for additional accommodation works within the five years limited by the Railways Clauses Consolidation Act, 1845, s. 73. An injury having subsequently arisen to the land from the insufficiency of the culvert to carry off all the water, an action in respect of such injury was brought by the occupier against the railway company in which it was alleged that the culvert was insufficient:—*Held,* on demurrer, that the action would not lie. Colley *v.* London and North Western Railway Company - 277

2. —— *Regulation of Railways Act,* 1873 (36 & 37 *Vict. c.* 48), *s.* 11, 12—*Through Rate—Railway Commissioners' Jurisdiction to alter Tolls fixed by Statute—Absence of Party interested.*] Under an Act in 1846 the B. Canal Company were authorized to charge certain tolls, rates, and dues for goods traffic in respect of the canals and other works of the company, and were prohibited from making an order to reduce, advance, or otherwise vary all or any of such tolls, rates, or dues, without the consent of a railway company, who guaranteed that, if the income of the canal company in any year was insufficient to pay a dividend of 4*l.* per cent. on the capital of the canal company, the railway company would make up the deficiency.—The B. Canal Company was one link in a chain of canals owned by various companies and forming a continuous line of navigation between two points. In pursuance of an application made to them by one of those companies the Railway Commissioners, under the Regulation of Railways Act, 1873, s. 11, made an order allowing through rates for goods traffic between those two points, the effect of which would be to reduce the tolls of the B. Canal Company below the maximum allowed by the Act of 1846, and below the amounts theretofore charged by the company.

RAILWAY—*continued.*
The railway company were not represented before the Commissioners, and did not consent to the order or to any variation of the tolls:—*Held*, that the order was not made without jurisdiction, and must be restrained by prohibition;—By Kelly, C.B., because the Commissioners could not make an order affecting the liability of the railway company under their guarantee without at least hearing them;—By Pollock, B., and Hawkins, J., because the consent of the railway company had not been obtained, and the Regulation of Railways Act, 1873, gave the Commissioners no power without such consent to reduce the tolls, rates, or dues as authorized by the Act of 1846. Warwick Canal Company *v.* Birmingham Canal Company - - - - 1

3. —— *Railway and Canal Traffic Act*, 1854 (17 & 18 *Vict. c.* 31), *s.* 7—*Notice—Limiting Liability—Reasonable Conditions.*] A condition that a railway company will not be liable "in any case" for loss or damage to a horse or dog above certain specified values delivered to them for carriage unless the value is declared, is not just and reasonable within sect. 7 of the Railway and Canal Traffic Act, 1854, as it is in its terms unconditional, and would, if valid, protect the company even in case of the negligence or wilful misconduct of their servants.—The case of *Harrison* v. *London, Brighton, and South Coast Ry. Co.* (2 B. & S. 122; 31 L. J. (Q.B.) 113), deciding that such a condition is reasonable, is overruled by *Peek* v. *North Staffordshire Ry. Co.* (10 H. L. C. 473; 32 L. J. (Q.B.) 241). Ashendon *v.* London and Brighton Railway Company - - 190

—— Passenger duty—Extra charge - 247
See Revenue. 3.

REPLEVIN BOND—Judgment by default 91
See Practice. 10.

REVENUE—*Income Tax—Balance of Profits and Gains—Deduction for Exhausted Capital*—5 & 6 *Vict. c.* 35, *s.* 100, *Sch. D.*—29 & 30 *Vict. c.* 36, *s.* 8.] The appellants, a firm of brewers, in order to increase the sale of their beer and so to increase their profits, purchased the leases of public-houses, which they let to tenants, who covenanted to buy of them all the beer to be sold in such houses. The appellants, besides covenanting to pay fixed rents for the terms of years reserved by the leases, were obliged, in some instances, to pay premiums for such leases. They claimed in arriving, for the purpose of the income tax, at the balance of profits and gains of their trade, to be entitled each year to an allowance in respect of a portion of the amount so paid by them as premiums, on the ground that such allowance represented a portion of their capital exhausted during the year in earning profits:—*Held*, that the appellants were not entitled to any allowance in respect of the premiums. Watney *v.* Musgrave - - 241

2. —— *Income Tax—Foreign Corporation—Dividends payable to Shareholders in the United Kingdom—Money intrusted to Agents for Distribution*—16 & 17 *Vict. c.* 34, *s.* 10.] A foreign company, carrying on business and earning profits abroad, had an agency in London, which conducted a branch and earned profits. The dividends of the company were payable, at the option

REVENUE—*continued.*
of the shareholders, abroad or by the London agency. In a particular year the London agency earned an amount of profits which enabled them to pay all the dividends demanded of them in that year, without requiring or obtaining any remittance from the company abroad. The London agency were assessed to income tax under Schedule D on the profits earned in the United Kingdom on an average of the three preceding years, the amount on which they were so assessed being less than the amount actually earned by them in the year. They further made a return under 16 & 17 Vict. c. 34, s. 10, that no interest, dividends, or other annual payments, payable out of or in respect of the stocks, funds, or shares of the company, had been intrusted to them for payment in the United Kingdom, and appealed against an assessment of the commissioners whereby they were assessed in respect of the dividends paid by them:—*Held*, by a majority of the Court (Pollock and Huddleston, BB.), that the money in the hands of the London agency for the payment of dividends in the United Kingdom was intrusted to them within the meaning of 16 & 17 Vict. c. 34, s. 10, and they were liable to be assessed on the full amount of such dividends, but that since the dividends were payable out of the general earnings of the company, consisting of profits made partly in the United Kingdom and partly elsewhere, and the London agency had already been assessed to income tax on the former under Schedule D., they ought only to be further assessed, under 16 & 17 Vict. c. 34, s. 10, and pay income tax, in respect of that portion of the dividends which represented profits arising out of the United Kingdom.—By Kelly, C.B. (dissenting), that the money in the hands of the London agency having sufficed to pay the dividends payable in the United Kingdom, no money had been intrusted to the London agency for that purpose within 16 & 17 Vict. c. 34, s. 10. Gilbertson *v.* Fergusson - - - - - 57

3. —— *Railway Passenger Duty*—5 & 6 *Vict. c.* 79, *s.* 2—*Sum charged as Fare—Sum charged to cover the Government Duty, or for extra Accommodation.*] By 5 & 6 Vict. c. 79, a duty at the rate of 5*l.* per cent. is payable upon all sums received or charged for the hire, fare, or conveyance of passengers upon any railway. A local Act fixed the maximum rates to be charged by the defendants "for the conveyance of passengers along the said railway, including the tolls for the use of the railway, and of carriages, and for locomotive power, and every other expense incidental to such conveyance as aforesaid, except government duty." In order to cover the duty of 5*l.* per cent., the defendants required passengers to pay in addition to the sum, whether maximum or otherwise, nominally charged for fare a further sum of five per cent.:—*Held*, that the duty was payable on the entire amount received by the defendants, and not merely on the amount nominally charged for fare.—*Semble*, that the duty would be so payable, although the amount received exceeded that which the defendants were lawfully entitled to charge.—*Quære*, whether the company were entitled to add the five per cent. to their fares to cover the government duty.—

REVENUE—*continued.*

The defendants provided sleeping saloon carriages available for first-class passengers on payment of a special charge in addition to the ordinary fare, and provided with sleeping accommodation, a lavatory, and other conveniences. When the carriages arrived at their destination they were put into a siding where the passengers could remain until the morning, and a special servant was employed to wait upon them, to call them when they wished, and to bring them hot water when they were called:—*Held*, that the accommodation so provided was incidental to the conveyance of passengers, and therefore the extra charge was a fare, on which duty was payable, within the meaning of 5 & 6 Vict. c. 79. Attorney General *v.* London and North Western Railway Co. [247

4. —— *Income Tax—Slate Quarry, Assessment of—5 & 6 Vict. c. 35, s. 60. Sched. A, No. 3.*] Slate was obtained from the side of a hill by underground workings carried on through levels:—*Held*, affirming the judgment of the Exchequer Division, that the works were to be assessed as a quarry under Rule 1 of No. 3 of Sched. A of 5 & 6 Vict. c. 35, s. 60, and not as a mine under Rule 2 of that enactment. Jones *v.* Cwmorthen Slate Company - - - - C. A. 93

5. —— *Succession Duty—Predecessor—Succession Duty Act*, 1853 (16 & 17 *Vict. c.* 51), *s.* 2.] A lunatic was tenant in tail in possession of land with remainder to his younger brother R., and his sister D. successively in tail. R. converted his estate tail into a base fee in remainder, and mortgaged his interest to secure debts of 124,000*l.* with a covenant to convey the fee simple to the mortgagees if he should become able to do so. The mortgage debt was more than the fee simple value of the land, and R. had no beneficial interest in the equity of redemption. For the benefit of all parties a compromise was entered into with the consent of the Lord Chancellor (as protector and in lieu of the lunatic under 3 & 4 Wm. 4, c. 74, s. 33), in pursuance of which R. and D. and the mortgagees all joined in deeds of settlement whereby they conveyed the land, subject to the estate tail of the lunatic but discharged from the mortgage, to trustees upon trust after the determination of the lunatic's estate to raise 37,000*l.* by sale or mortgage of the land and to pay that sum to the mortgagees, and subject thereto to hold the land to the use of D. for life with remainder to her sons successively in tail. This arrangement was carried out, and upon the death of the lunatic D. became tenant for life in possession, and upon her death the defendant, as her son, became tenant in tail in possession:—*Held*, that the defendant derived his interest as successor from his mother D. and not from his uncle R., as predecessor, under the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 2, and was therefore liable to duty at 1*l.* per cent. and not at 3*l.* per cent. Attorney General *v.* Dowling [139

RULES—Order V., r. 4 (a) - - - 275
See Practice. 2.

—— Order XIV., rs. 1, 3 - - - 211
See Practice. 11.

RULES—*continued.*

—— Order XXIX., rr. 2, 4 - - - 91
See Practice. 10.

—— Order XXXVI., rr. 3, 17 a - - 196
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—— Order XXXIX., r. 1 - - - 275
See Practice. 2.

—— Order LV. - - - - 307
See Practice. 3.

—— —— r. 1 - - - 15, 180
See Practice. 4, 5.

—— Equity Exchequer, 1866. X. r. 2, 3 218
See Practice. 6.

—— Hilary Term, 1853, r. 62 - 15, 180
See Practice. 4, 5.

SALE OF GOODS—*Sale of Specific Chattel—Conditions of Sale—Warranty.*] The plaintiff bought a horse by public auction at a repository warranted to be a good worker, subject to the condition that "horses warranted good workers, whether sold by private treaty or public auction, not answering such warranty, must be returned before five o'clock of the day after the sale; shall then be tried by a person to be appointed by the auctioneer, and the decision of such person shall be final." The horse was not returned within the stipulated time:—*Held*, on demurrer, in an action on the warranty, that the plaintiff's only remedy was under the condition, and that he could not maintain the action. Hinchcliffe *v.* Barwick - - C. A. 177

SETTLEMENT—Poor law—Lunatic in asylum
See Poor Law. [215

SHIP—*Charterparty—Bills of Lading, Master refusing to sign—Conversion of Cargo—Practice—Trial by Judge without Jury—Motion for New Trial.*] By a charterparty the defendants agreed to carry for the plaintiffs a cargo of coke from C. to B. the master to sign the bill of lading as presented within twenty-four hours after the cargo should be on board, or pay 4*d.* per ton per day for each day's delay as damages. The cargo having been loaded, a bill of lading was presented to the master, which he refused to sign without inserting a clause that the vessel should not be liable for duties on cargo caused by non-arrival before a specified date. The plaintiffs having declined to accept such a bill of lading, the master sailed with the cargo for B. without signing any bill of lading. The plaintiffs directed their consignee to deduct the penalty under the foregoing clause. The master was willing to deliver the cargo on payment of the freight in full, but the consignee having insisted upon deducting the penalty, the master declined to deliver the cargo, and landed it and stored it at B.:—*Held* (1.), That there had been a breach of the charterparty in the master not having signed the bill of lading as presented to him. (2.) That the plaintiffs were not entitled to deduct the penalty for delay in signing the bill of lading. (3.) That there had been no conversion of the cargo. (4.) The plaintiffs were only entitled to nominal damages for not signing the bill of lading, the master being willing to deliver the cargo on payment of the full freight.—Where a trial has taken place before a judge without a jury, the Court of Appeal, in all cases

SHIP—*continued.*

except that of surprise, has jurisdiction upon an appeal to review the findings as to the facts, without a rule for a new trial having been obtained. JONES *v.* HOUGH - - C. A. 115

2. —— *Bill of Lading—Nominal Freight—Cargo on Ship's Account—Lien of Unpaid Vendor—Contract to pay Sum equivalent to substantial Freight—Evidence.*] The plaintiff, being the owner of a ship called the *K.*, loaded her with wheat at P.; as the cargo was taken on the ship's account, freight at the nominal rate of 1*s.* per ton was inserted in the bill of lading, which contained the usual exceptions of perils of the seas. He sold the cargo whilst afloat to H. upon the terms that "freight" should be paid at the rate of 60*s.* per ton. H. sold his interest in the cargo, and it ultimately vested in the defendant, who bought the cargo on the same terms on which it had been sold to H. The *K.* on her arrival was ordered to Y., where she commenced to discharge her cargo: the defendant received it and paid large sums on account. The quantity delivered was less than that mentioned in the bill of lading by about seventy quarters. The plaintiff claimed "freight" at the rate of 60*s.* per ton upon all the cargo delivered; the defendant claimed to deduct 193*l.* on account of short delivery. At the trial the jury were of opinion that the short delivery arose from the excepted perils, and found for the plaintiff for the total sum claimed by him:—*Held*, that although the plaintiff might not have a lien as shipowner, the cargo being taken on ship's account, nevertheless he had a lien as unpaid vendor; that from the defendant's conduct a contract by him might be implied to pay freight at the rate of 60*s.* per ton upon all cargo delivered, and that the finding of the jury for the plaintiff was right. SWAN *v.* BARBER - - - C. A. 130

SLATE QUARRY—Assessment of—Income tax
See REVENUE. 4. [93

STATUTES:—13 Eliz. c. 5 - - - 47
See FRAUDULENT CONVEYANCE.

3 & 4 Wm. 4, c. 27, ss. 2, 3 - - 264
See VENDOR AND PURCHASER.

5 & 6 Vict. c. 35, s. 100, Sch. D. - - 241
See REVENUE.

5 & 6 Vict. c. 79, s. 2 - - - 247
See REVENUE.

8 Vict. c. 20, ss. 68, 73 - - - 277
See RAILWAY.

16 & 17 Vict. c. 34, s. 10 - - - 57
See REVENUE. 2.

16 & 17 Vict. c. 51, s. 2 - - - 139
See REVENUE. 5.

16 & 17 Vict. c. 97, s. 80 - - - 215
See POOR LAW.

17 & 18 Vict. c. 31, s. 7 - - - 190
See RAILWAY. 3.

17 & 18 Vict. c. 36, ss. 1, 7 - - 24
See BILL OF SALE.

29 & 30 Vict. c. 36, s. 8 - - - 241
See REVENUE.

30 & 31 Vict. c. 142, s. 31 - - - 313
See COUNTY COURT. 2.

31 & 32 Vict. c. 71, s. 3 - - - 227
See COUNTY COURT.

STATUTES—*continued.*

32 & 33 Vict. c. 41, s. 16 - - - 19
See POOR RATE.

32 & 33 Vict. c. 51, s. 2 - - - 227
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32 & 33 Vict. c. 71, ss. 17, 23, 24 - 155
See BANKRUPTCY. 2.

—— —— ss. 23, 24 - - - 170
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—— —— ss. 49, 125 - - - 165
See BANKRUPTCY. 3.

36 & 37 Vict. c. 48, ss. 11, 12 - - 1
See RAILWAY.

38 & 39 Vict. c. 55, ss. 150, 179, 180, 257 199
See LOCAL GOVERNMENT ACTS. 2.

—— —— s. 253, sch. 2, r. 70 - - 287
See LOCAL GOVERNMENT ACTS.

38 & 39 Vict. c. 77, s. 33 - - 15, 180
See PRACTICE. 4, 5.

TRIAL—Notice of—Close of pleadings - 196
See PRACTICE. 9.

VENDOR AND PURCHASER—*Conveyance of Land adjoining intended Highway—Presumption as to Ownership of Soil of intended Highway—Statute of Limitations* (3 & 4 *Wm.* 4, *c.* 27), *ss.* 2, 3—*Dispossession of Owner of Land—Discontinuance of Possession—User of Land.*] The presumption that the soil of a highway belongs to the owner of the adjoining land, usque ad medium filum viæ, does not apply to ground which was intended to be used as a highway, but has never been dedicated to the public; and if the owner of the soil of the intended highway disposes of the adjoining land by conveyances in which it is described as bounded by the intended highway, the grantees do not acquire by presumption of law the ownership of the soil of the intended highway.—Acts of user committed upon land, which do not interfere and are consistent with the purpose to which the owner intends to devote it, do not amount to a "dispossession" of him, and are not evidence of "discontinuance of possession" by him within the meaning of 3 & 4 Wm. 4, c. 27, s. 3—In 1854 L. conveyed to the defendant a plot of land upon the south side of an intended street, upon which the defendant built a factory. In 1857 L. conveyed to certain trustees the plot of land upon the north side of the intended street, which in 1872 vested in the defendant. Neither of the conveyances granted in express terms the soil of the intended street, but they described the plots of land as bounded by it. It was never dedicated to the public as a highway. From 1854 the defendant had placed upon the intended street materials used at his factory, so as to block it up except as against foot passengers, and in 1865 he enclosed an oblong portion of it. In 1872 he fenced in the ends of the intended street. The plaintiff was tenant for life of all the land of which L. had died seized, and in 1876 commenced an action to recover the site of the intended street. Within twenty years before action L. had repaired a gate at one end of the intended street.—*Held*, first, that the conveyances executed by L. in 1854 and 1857 did not by presumption of law grant the

VENDOR AND PURCHASER—*continued.*
soil of the intended street; secondly, that the title of the plaintiff was not defeated by the Statute of Limitations (3 & 4 Wm. 4, c. 27), ss. 2, 3. LEIGH *v.* JACK - - - - - C. A. 264

WARRANTY—Horse - - - - 177
See SALE OF GOODS.

WAY, RIGHT OF—*Award under Inclosure Act—Enlargement of User of Way.*] Where there is an express grant of a private right of way to a particular place to the unrestricted use of which the grantee of the right of way is entitled, the grant is not to be restricted to access to the land for purposes for which access would be required at the time of the grant.—By an inclosure award a road was set out as a carriage road and drift way from a highway to certain of the inclosed lands. The defendants, a railway company, acquired some of these lands, and built a cattle pen thereon adjoining their railway, and used the road for the passage to and from the highway of cattle that were to be or had been conveyed on their railway, such user being much greater than the user at the time of the grant, which was exclusively for agricultural purposes:—*Held*, that this was a lawful user on their part, and that they were not restricted to the user which existed at the time of the grant. FINCH *v.* GREAT WESTERN RAILWAY COMPANY - - - - - - 254

WORDS—"Assurance" - - - 24
See BILL OF SALE.

—— "Discontinuance of possession" - 264
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—— "Event" - - - 15, 180
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—— "Good cause" - - - - 307
See PRACTICE. 3.

END OF VOL. V.

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